(1)

91-2044

No. _____

Supreme Court, U.S.
FILED
JUN 19 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

DENNIS MERLE LEE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division Six

PETITION FOR A WRIT OF CERTIORARI

June 19, 1992

BRUCE FEIN
Attorney at Law
562 Innsbruck Avenue
Great Falls, VA 22066
(703) 759-5011

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does California's strict criminal liability law – the Seller Assisted Marketing Plan Act ("SAMP Act") – violate due process by failing to provide fair warning that it applies to single-shot business sales with no continuing legal obligation between the seller and the purchaser?

2. Did the California Court of Appeal violate constitutional due process by compromising the terms of petitioner's plea bargain which expressly preserved a right on appeal to challenge the constitutionality of the SAMP Act as applied to his conduct?

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 6

I. The California Court of Appeal Decision Upholding The Constitutionality Of The SAMP Act As Applied To Petitioner Sharply Departs From Applicable Due Process Rulings Of This Court 6

II. The California Court Of Appeal Violated Constitutional Due Process In Failing To Honor The Terms Of Petitioner's Plea Bargain 13

CONCLUSION 19

APPENDICES ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Bouie v. City of Columbia, 378 U.S. 347 (1964) 7

Boyce Motor Lines v. United States, 342 U.S. 337 (1952) 6, 7

Connally v. General Construction Company, 269 U.S. 385 (1926) 6

Cox v. Louisiana, 379 U.S. 559 (1965) 7

Lambert v. California, 355 U.S. 225 (1957) 7

Liparota v. United States, 471 U.S. 419 (1985) 11

Morissette v. United States, 342 U.S. 246 (1952) 11

People v. Mott, 189 Cal.Rptr. 589 (1983) 12

People v. Overstreet, 231 Cal.Rptr. 213 (1986) 11

People v. Rojas, 253 Cal.Rptr. 786 (1988) 11

People v. Santos, 216 Cal.Rptr. 911 (1985) 18

Robinson v. W.C.A.B., 239 Cal.Rptr. 841 (1987) 18

Santobello v. New York, 404 U.S. 257 (1971) 18

Screws v. United States, 325 U.S. 91 (1945) 6

United Public Workers v. Mitchell, 330 U.S. 75 (1947) 6

United States v. Custer Channel Wing Corp., 376 F.2d 675 (4th Cir.), *cert. denied sub nom. Custer Channel Wing Corp. v. United States*, 389 U.S. 850 (1967) 11

TABLE OF AUTHORITIES – Continued

Page

United States v. Murdock, 290 U.S. 389 (1933) 11

United States v. Pomponio, 429 U.S. 10 (1976)..... 11

United States v. Sussman, 37 F. Supp. 294 (E.D. Pa. 1941)..... 11

United States v. Thompson/Center Arms Co., 60 U.S.L.W. 4480, No. 91-164 (U.S. June 8, 1992) 11

STATUTES

28 U.S.C. § 1257(3) (1988)..... 3

California Civil Code §§ 1812.200 *et seq.* (West 1985)..... 2, 3, 5

OTHER

The American Heritage Dictionary, Second College Edition (1982) 8

No. _____

In The

Supreme Court of the United States

October Term, 1991

DENNIS MERLE LEE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division Six

PETITION FOR A WRIT OF CERTIORARI

The petitioner Dennis Merle Lee respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division Six, entered in the above-entitled proceeding on November 27, 1991.

OPINIONS BELOW

The order of the Supreme Court of California denying petitioner's application for review is reprinted at Appendix 18, *infra*.

The opinion of the Court of Appeal of the State of California is unreported, and is reprinted at Appendix 1, *infra*.

The unelaborated ruling of the Superior Court of California, County of Ventura, denying petitioner's motion attacking the constitutionality of the California Seller Assisted Marketing Plan Act ("SAMP Act") (Calif. Civ. Code §§ 1812.200 *et seq.* (West 1985)) as applied in this case has not been reported, and is reprinted at Appendix 19, *infra*.

JURISDICTION

On December 12, 1988, the District Attorney of the County of Ventura, California, filed an information charging petitioner with 8 counts of fraud under Section 487 of the California Penal Code and 38 counts of violations of the SAMP Act.[1] The Superior Court denied petitioner's constitutional due process attack on the SAMP Act as applied to his case. *See* Appendix 19, *infra*.

Petitioner then negotiated a plea bargain with respondent. He agreed to plead guilty to 8 SAMP Act violations in exchange for the dismissal of all other counts, and the preservation of the right on appeal to contest the constitutionality of the SAMP Act as applied to his conduct. CT Vol. IV at 893. The Superior Court accepted the plea bargain, and sentenced petitioner

[1] *See* Clerk's Transcript on Appeal at Volume 1, p. 1 (hereinafter "CT Vol. ___ at ___").

to three years and four months imprisonment, and restitution in the amount of $4,940.00. CT Vol. IV at 896-97. Petitioner expressly asked and received assurance from the Superior Court that his guilty plea did not foreclose renewing his challenge to the constitutionality of the SAMP Act as applied on appeal. *See* Reporter's Transcript, Vol. VI of VI at 1435-69 (hereinafter "RT Vol. ___ at ___"); Appendix 59-82, *infra*.

The California Court of Appeal rejected petitioner's constitutional and other claims. *See* Appendix 1, *infra*.

The final judgment of the California Supreme Court denying a petition for review was entered on February 20, 1992. *See* Appendix 18, *infra*.

On April 27, 1992, Justice Sandra Day O'Connor entered an order extending the time for filing a Petition for a Writ of Certiorari to and including June 19, 1992.

The jurisdiction of this Court to review the judgment of the California Court of Appeal is invoked under 28 U.S.C. § 1257(3) (1988).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Section 1, Fourteenth Amendment United States Constitution: "[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . ."

California Civil Code §§ 1812.200 *et seq.* (West 1985), is reprinted at Appendix 20, *infra*.

STATEMENT OF THE CASE

1. Petitioner, Dennis Merle Lee, owns patents for various solar energy heating and cooling devices. The patents are advertised as valuable in reducing the costs of electricity. Under the banner of CONSERVE Financial Services, a corporation in which Lee was both president and majority stockholder, petitioner sold "how to" materials that would enable buyers to manufacture, sell, or install his patented devices. Petitioner's "how to" materials, consisting of videotapes and printed matters, were sold as three separate programs, priced at $2,000 each, or $5,000 if all three were purchased. *See* Appendix 2-4, *infra*.

The program sales were single-shot agreements characteristic of retail purchases. The buyers paid money in exchange for petitioner's programs, *simpliciter*. There were no continuing or executory obligations on either party to the agreement. Potential purchasers enjoyed the opportunity to pay a deposit to borrow the programs for 10 days before determining whether to buy. *See* Appendix 83-85, *infra*; CT Vol. VIII at 2155-56; RT Vol. I at 75.

Petitioner advised program buyers of the business utility of establishing a voluntary network among themselves to exchange market information or to coordinate their manufacturing, sales, and installation enterprises through joint ventures or referrals. Further, petitioner suggested that program buyers might voluntarily aggregate common orders through the network for products required for manufacture to obtain quantity discounts.

The plan, as contemplated by petitioner, would entail petitioner sales to the network, with resales to network members. CT Vol. VIII at 2125-26.

2. On December 12, 1988, petitioner was charged with 38 counts of violating the SAMP Act and eight counts of grand theft under section 487 of the California Penal Code. After legal skirmishing before the California Superior Court, petitioner pled guilty to eight SAMP Act counts in exchange for dismissal of all other charges.[2] The plea was expressly conditioned on retention of the right to challenge the constitutionality of the SAMP Act on appeal. *See* Appendix 59-82, *infra*. The Superior Court, in preliminary proceedings, rejected petitioner's claims that his single-shot sales were not covered by the Act, and, that if the Act was so interpreted as part of a statute that ordained strict criminal liability, the fair warning component of constitutional due process would be violated. *See* Appendix 19, *infra*.

The Superior Court sentenced petitioner to three years and four months imprisonment, and restitution in the amount of $4,940.00. CT Vol. IV at 896-97. The Court of Appeal, Second Appellate District, Division Six, affirmed. The Court of Appeal ruled that petitioner's

---

[2] The violations included 2 counts of failing to provide a potential purchaser of a SAMP with a disclosure statement (Civ. Code, § 1812.205), 2 counts of failing to provide a potential purchaser of a SAMP with an information sheet (Civ. Code, § 1812.206), 2 counts of failing to provide a potential purchaser of a SAMP with a written contract containing mandatory provisions (Civ. Code, §§ 1812.207, 1812.209), and 2 counts of committing fraud in connection with the offer or sale of a SAMP (Civ. Code, § 1812.217). *See* Appendix 5, *infra*.

guilty plea constituted a waiver of his right to have it consider the ambiguity of the SAMP Act as applied to his conduct in evaluating his constitutional due process claim. *See* Appendix 8-11, *infra.* It then rejected petitioner's constitutional fair warning claim bottomed on the Act's strict liability criminal standard. *Id.* at 15-17.

The Supreme Court of California denied review. *See* Appendix 18, *infra.*

REASONS FOR GRANTING THE WRIT

I. The California Court of Appeal Decision Upholding The Constitutionality Of The SAMP Act As Applied To Petitioner Sharply Departs From Applicable Due Process Rulings Of This Court

1. Due process requires criminal statutes to provide fair warning as to what is prohibited. *Connally v. General Construction Company,* 269 U.S. 385 (1926). The clarity of the warning constitutionally varies depending on whether proof of *mens rea* is an element of criminal liability. Thus, the greater the ambiguity of the substantive prohibition, the greater the due process concern for proof of a wrongful intent. *See e.g., Screws v. United States,* 325 U.S. 91 (1945); *Boyce Motor Lines v. United States,* 342 U.S. 337 (1952). The presence of advisory opinion machinery may alleviate fair warning concerns, *cf. United Public Workers v. Mitchell,* 330 U.S. 75, 103 (1947), as may direct industry participation in the processes culminating in a strict prohibition. *Boyce Motor Lines, supra,* at 341-42.

Strict liability criminal laws are more suspect when directed against inaction, such as a failure to register or

disclose information, as opposed to prohibitions against affirmative wrongful conduct. *Lambert v. California,* 355 U.S. 225 (1957). The *Lambert* decision quoted approvingly from *The Common Law*: "A law which punishes conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." *Id.* at 229.

Fair warning concerns are additionally heightened when courts adopt strained or tortured interpretations of a criminal statute, *see Bouie v. City of Columbia,* 378 U.S. 347 (1964), thus turning the statute into a trap for the unwary by seeming promises of safety. *Cf. Cox v. Louisiana,* 379 U.S. 559, 571 (1965).

2. The SAMP Act possesses earmarks that heighten due process concerns for fair warning. There is no advisory opinion mechanism. Indeed, in this case, a state law enforcement official advised an employee of petitioner's company that its sales activities were not covered. *See* Appendix 55-59, *infra*. Further, petitioner's violations of the Act consisted of inaction with no intent to defraud. *See* n.2, *supra*; Appendix 61-65, *infra*. Additionally, as the court of appeal held, the Act requires no proof of evil or wrongful intent to secure a criminal conviction, although the express language of the Act punishes only violations committed "willfully." *See* Appendix 15-17, *infra*. Finally, there was no widespread industry participation in the SAMP Act, unlike the criminal prohibition in *Boyce Motor.*

3. The SAMP Act insinuates inapplicability to single-shot sales with no continuing or unfulfilled contractual obligation. Thus, the legislative finding and intent

expressly contemplate an "initial" payment in transactions that presented the evils addressed by the Act. *See* Appendix 21-22, *infra*. A payment is "initial," however, only if additional payments are required, which was not true of petitioner's sales.

The definition of a "Seller assisted marketing plan" is described with references to an "initial payment" and "initial cash payments," terms, as shown hereafter, that seem to envision additional money owed or to be owing by the buyer to the seller. *See* Appendix 23-26, *infra*.

The definition of "Seller" in the Act "is the person to whom the purchaser becomes contractually obligated," a concept that fits awkwardly, if at all, to single-shot contractual exchanges. *See* Appendix 26, *infra*. For instance, buyers of petitioner's programs did not "become" contractually obligated in the ordinary sense because there was no futurity to their contracts. Their obligations disappeared simultaneously with their single payments of money. The ordinary meaning of "become" is "[t]o grow or come to be" (*see The American Heritage Dictionary*, Second College Edition (1982)), but buyers of petitioner's programs did not have their money obligation "grow or come to be" because the obligation lacked any element of futurity. *See* RT Vol. I at 72-75; Appendix 53-54, *infra*.

The definition of "Purchaser" in the Act is "a person who is solicited to become obligated or does become obligated on a seller assisted marketing plan contract." *See* Appendix 26, *infra*. As with the definition of "Seller," this complementary definition in its use of the word "become" insinuates some futurity of contractual obligation on the buyer's part.

The definition of "Initial payment" seems to exclude arrangements like those of petitioner in which the delivery or borrowing of an item of purchase is made *prior* to any actual or required money payment. *See* Appendix 27-28, *infra*. Thus, the term is defined as "the total amount a purchaser is obligated to pay under the terms of a seller assisted marketing plan contract *prior to* or at *the time of* delivery of the equipment, supplies, products or services . . . . " (emphasis supplied).

The term "Initial cash payment" is defined as "that portion of the initial payment which the purchaser is obligated to pay the seller prior to or at the time of delivery of equipment, supplies, products, or services." *See* Appendix 28, *infra*. The definition obviously contemplates more than one payment, which petitioner's sales arrangements lacked.

A "Seller assisted marketing plan contract" is defined as "any contract or agreement which obligates a purchaser to a seller," which seems to suggest some type of executory promise or duty of the buyer to the seller, not a single-shot exchange of money for goods. *See* Appendix 27, *infra*.

The state prosecutor asserted that the evil addressed by the Act was a slow "bleed[ing]" of buyers through continuing legal contractual obligations, a nonexistent problem with single-shot purchases. Appendix 83, *infra*. The California Superior Court judge agreed that the original intent of the statute seemed to have been to exclude single-shot sales like those of petitioner. Appendix 53-54, *infra*. These statements confirm the enormous ambiguity of the SAMP Act in its application to single-shot sales.

That conclusion is fortified by substantive requirements of SAMP Act sellers. Thus, a required disclosure must include a "statement of the initial payment to be paid by the purchaser to the seller." Appendix 34, *infra*. But there is no "initial payment" in single-shot sales like those of petitioner.

A complementary provision requires SAMP contracts to include in writing "[t]he terms and conditions of payment including the initial payment, additional payments, and down payment required." Appendix 39, *infra*. But there are no initial or additional payments or down payments in single-shot sales like those of petitioner's.

In sum, ordinary business persons with ordinary mental acuity after reading the SAMP Act would have substantial doubts as to whether it applied to single-shot sales with no continuing legal obligation between seller and buyer. Indeed, an employee of petitioner's company was advised by a state law enforcement official that its sales activities were not covered by the Act, *see* Appendix 55-59, *infra*, and the trial judge conceded substantial ambiguity in the SAMP Act, as applied to petitioner. RT Vol. I at 72.

The trial judge, however, held that the Act does apply to single-shot sales, and petitioner is not challenging that conclusion. The enormous ambiguity of the Act's application to petitioner, however, bears directly on the constitutional fair warning claim.

4. The SAMP Act imposes criminal punishment for violations that are committed "willfully." *See* Appendix 48-49, *infra*. In accord with the canon of lenity and concern for fair warning, the term "willfully" has been interpreted by this Court in particular federal criminal cases

to require proof of a guilty mind or an intentional violation of a known legal duty to secure a conviction. *See e.g., United States v. Pomponio*, 429 U.S. 10, 12 (1976); *see also United States v. Thompson/Center Arms Co.*, 60 U.S.L.W. 4480, No. 91-164 (U.S. June 8, 1992) (discussing rule of lenity); *Liparota v. United States*, 471 U.S. 419, 425-28 (1985); *Morissette v. United States*, 342 U.S. 246, 250-62 (1952) (discussing criminal law rebuttable presumption of a *mens rea* element in the proof of offenses). In sum, criminal law offenses with no *mens rea* requirement are disfavored because of concerns for fundamental fairness.

California state courts also ordinarily interpret state criminal law ambiguities in favor of the defendant with no seeming exception for the word "willfully." *See e.g., People v. Overstreet*, 231 Cal.Rptr. 213, 215 (1986); *People v. Rojas*, 253 Cal.Rptr. 786, 790 (1988).

Petitioner concedes that the term "willfully" has also been interpreted by courts in particular cases to permit convictions without proof of a *mens rea*. *See e.g., United States v. Sussman*, 37 F. Supp. 294, 296 (E.D. Pa. 1941). It seems difficult to dispute, however, that the case law is cloudy on whether the term "willfully" in a criminal statute requires proof of a bad motive or evil intent. *See e.g., United States v. Murdock*, 290 U.S. 389, 394-96 (1933), *United States v. Custer Channel Wing Corp.*, 376 F.2d 675, 680-82 (4th Cir.), *cert. denied sub nom. Custer Channel Wing Corp. v. United States*, 389 U.S. 850 (1967).

Petitioner thus might have reasonably believed that the SAMP Act criminal provisions required proof of a bad motive because it punishes only violations committed

"willfully." That conclusion is reinforced by a companion civil sanction that offers the seller an opportunity to cure "inadvertent" violations to prevent voidability of a SAMP contract. *See* Appendix 46-47, *infra.* If inadvertent violations are treated leniently for civil sanctions, it might reasonably be thought the same leniency would bless the sister criminal provision, especially by, its employment of the word "willfully."

In *People v. Mott,* 189 Cal.Rptr. 589, 594 (1983), nevertheless, the California Court of Appeal, despite the rule of lenity, interpreted the word "willfully" in the SAMP Act to mean only an intent to commit the act or omission that violated the Act. That interpretation of "willfully" was followed by the Court of Appeal in this case. Petitioner does not challenge the constitutionality of that interpretation, standing alone.

5. Petitioner does contend, however, that the combination of the following factors in the SAMP Act make its criminal prohibition unconstitutional as applied to petitioner for failure to provide fair warning that the Act reached single-shot sales; the enormous ambiguity of the reach of the SAMP Act to such sales: the state court's interpretation of the word "willfully," contrary to the customary rule of lenity and the rule favoring defendants in the resolution of criminal law ambiguities; the absence of an advisory opinion mechanism to clarify uncertainty as to the Act's application; the lack of general industry participation in the legislative enactment of the SAMP Act; and, its punishment of inaction, as opposed to action. The coalescence of these factors in petitioner's case establish a clear violation of the fair warning component of due process.

Accordingly, the Petition for a Writ of Certiorari should be granted to correct an egregious departure from this Court's constitutional fair warning precedents by the Court of Appeal in upholding the constitutionality of the SAMP Act as applied to petitioner.

II. The California Court of Appeal Violated Constitutional Due Process In Failing To Honor The Terms Of Petitioner's Plea Bargain

The California Court of Appeal declined to consider the fair warning component of petitioner's constitutional attack on the SAMP Act based on its ambiguity as applied to single-shot sales. The Court of Appeal reasoned that petitioner's guilty plea waived that right. *See* Appendix 9-12, *infra.*

But respondent and the Superior Court expressly promised petitioner in exchange for his guilty plea that he could challenge the constitutionality of the SAMP Act on appeal as applied to his sales. Appendix 59-82; RT Vol. VI at 1502-03. The following exchanges occurred prior to the plea:

> THE COURT: Do you have any other questions?
>
> THE DEFENDANT: Yes, I do.
>
> I had another question, Your Honor. I may already have the answer to this too, and if I do, I apologize for wasting your time.
>
> It has just been brought to my attention, and I imagine it's the only way to do it, that in doing this I know a key issue is for me to have the right to the appeal and to exhaust the appeals of the constitutionality of the SAMP plan basically as it relates to me. I just wanted to clarify that it

was – that I would be capable on bail to exhaust those remedies before I would have liability to a sentence or liability to whatever sentence might have been imposed. I would have the ability to appeal, to exhaust the appeal rights that I have before that.

Appendix 60-61.

* * *

THE COURT: Yes, you can't appeal before there has been a sentence.

THE DEFENDANT: I understand. Yeah, I hadn't thought of that. But I guess that's asking for too much. The other thing is that I had asked that I be allowed, because it's very, very important to me doing this, that I be allowed to read a statement or to make a statement at the time of pleading, especially to the 217 section of the 1812.217 status that I am not in any way by doing this confessing my intention to willfully, intentionally with intent defraud anyone with this.

I understand that intent is not as it's written now part of that statute as has been represented today in court and yesterday in court. And I think I understand that. I don't want by doing this to be implying that I had intent to defraud anybody with the 1812.217 section, but I may have made a statement that was misleading or that somebody didn't show wasn't exactly factual, but not with any knowledge of the same, I am not pleading to saying that I intentionally did that. And that's very important to me.

THE COURT: Well, I don't really at this moment know whether that is in conflict with

what the district attorney believes to be required, so I will leave it up to her.

MS. RILEY: Your Honor, in dismissing the 487 count, I believe we dismissed the counts that carried with them the intent to defraud. The 217 count that the defendant is pleading to, he would be pleading to the language as it is written in the information and what it specifically says – well, I will read it so there will be no doubt as to what it specifically says at the time of the plea.

THE COURT: Anything else?

MR. COHAN: I think not. I think we can go forward.

Mr. Lee?

Appendix 62-63.

* * *

THE COURT: Well, the district attorney has made a statement and it is on the record that it is her opinion and that she is accepting your plea with the understanding that your plea or this section has pled in the Information does not require that you have the intent to deceive or to misrepresent.

Is that correct?

MS. RILEY: That's correct.

THE COURT: Okay. Now with that statement, it would appear to me that I have two parties in front of me who are in agreement with what you are pleading to and it would be very difficult it would seem to me for any appellate

process to not agree with the statements of the two of you.

Appendix 64.

* * *

THE COURT: I guess I am concerned in this case because the only grounds on appeal that appears to me to be actively sought in this case is the unconstitutionality of the law that relates to this whole thing. And I suppose that if in fact it's successful, then it would appear that perhaps no punitive matters of any kind, including the general ones, would be a good boy should apply. So I guess I am indicating that under the circumstances of this case, the pending appeal that I would be willing to suspend and delay the terms and conditions of probation entirely pending appeal.

Do you have any thought on that?

MS. RILEY: Well, unfortunately I did not discuss this with anyone else, but my feeling about that is that the constitutional basis of the appeal is such that if the Court were to determine that this code were unconstitutional, although I don't initially believe that were to happen, but if that were to happen, then none of the – none of the counts that the defendant has pled to would be in effect. And so for that reason, I would agree with the Court's analysis.

Appendix 76.

* * *

MS. RILEY: Mr. Lee has your attorney explained to you and do you understand that this plea will result in your conviction and that you are therefore giving up, waiving each of the

following constitutional rights: You are giving up the right to have every charge and allegation against you determined by a jury of 12 persons.

THE DEFENDANT: Yes.

MS. RILEY: You are giving up the right to confront and through your attorney cross-examine each witness called by the prosecution to prove your guilt.

THE DEFENDANT: Yes.

MS. RILEY: You are giving up the right against self-incrimination, which means that you would not have to testify at your trial; and if you did not, the judge or the jury could not consider this as evidence of your guilt.

Do you understand that?

MS. RILEY [sic]: Yes.

THE DEFENDANT [sic]: And do you agree that all facts and information relating to any and all counts, allegation of prior convictions, and other sentencing enhancements allegations which are dismissed by the Court as part of this disposition, may be included in the probation report and considered by the Court in determining the sentence what we have referred to as a Harvey waiver?

THE DEFENDANT: Yes.

Appendix 79-80.

* * *

MR. COHAN: So those are the only constitutional rights which the defendant is giving up at this time based on this plea. And he is not giving up any of his appellate remedies other

than the waiver of the three rights specifically enumerated under heading F on Page 4.

Is that correct?

THE DEFENDANT: Oh, yeah. Thank you.

Appendix 82.

Petitioner's fair warning claim based on the strict liability standard of the SAMP Act is inextricably intertwined with the ambiguity of the Act as applied to petitioner's single-shot business sales.

Petitioner fairly presented that claim on appeal. Insofar as the California Court of Appeal refused to consider the ambiguity of the SAMP Act in deciding petitioner's constitutional challenge, petitioner's plea bargain was compromised in violation of constitutional due process. *See Santobello v. New York*, 404 U.S. 257, 262 (1971); *Robinson v. W.C.A.B.*, 239 Cal.Rptr. 841, 844 (1987); *People v. Santos*, 216 Cal.Rptr. 911, 912-13 (1985).

This Court thus should grant the Petition for a Writ of Certiorari and vacate the judgment and remand the case to the California Court of Appeal. It should be instructed either to entertain petitioner's fair warning claim, including consideration of the ambiguity of the SAMP Act as applied to petitioner's single-shot sales, in evaluating whether the strict liability standard of the SAMP Act satisfied due process as applied to petitioner, or to permit petitioner to withdraw his guilty plea.

CONCLUSION

This Petition for a Writ of Certiorari should be granted. If this Court grants the Writ regarding question 2, then reviewing question 1 at this time would be premature.

Respectfully submitted,

BRUCE FEIN
Attorney at Law
562 Innsbruck Avenue
Great Falls, VA 22066
(703) 759-5011

Counsel for Petitioner

June 19, 1992

No. _____

In The

Supreme Court of the United States

October Term, 1991

DENNIS MERLE LEE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX

TABLE OF CONTENTS

Page

Opinion of the Court of Appeal of the State of California, Second Appellate District, Division Six.....App. 1

Order of the Supreme Court of the State of California filed February 20, 1992.....App. 18

Order of the Superior Court of California, County of Ventura dated September 26, 1989 .....App. 19

California Civil Code § 1812.200 *et seq.* (West 1985).....App. 20

Reporters' Transcripts in the Court of Appeal of the State of California, Second Appellate District

Vol. I, pp. 75-76 (proceedings of April 21, 1989).....App. 53

Vol. III, pp. 739-43 (proceedings of February 22, 1990).....App. 55

Vol. VI, pp. 1440-62 (proceedings of May 31, 1990).....App. 59

Vol. VI, p. 1486 (proceedings of May 31, 1990).....App. 83

Clerk's Transcript in the Court of Appeal of the State of California, Second Appellate District

Vol. VIII, pp. 2155-56 (proceedings of October 24-28; November 2-3, 8-10 (1988)).....App. 83

WAC _____
JAG _____
SS _____
HMC _____
AC _____
JAC _____

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DENNIS MERLE LEE, Defendant and Appellant.	2d Crim. No. B052314 Super.Ct. No. CR 24072 (Ventura County) COURT OF APPEAL SECOND DIST. (Filed Nov. 27, 1991) ROBERT N. WILSON, Clerk Deputy Clerk

Appellant Dennis Merle Lee pled guilty to eight counts of violating the Seller Assisted Marketing Plan Act (SAMP Act or Act). Civ. Code. § 1812.200 et seq.)[1] He contends his convictions should be reversed on the grounds that (1) he did not sell a seller assisted marketing

[1] Unless otherwise stated, all statutory references are to the Civil Code.

plan (SAMP).[2] (2) enforcement of the SAMP Act violated his due process rights because the terms of the statute are vague and ambiguous, (3) the Act comprises an unconstitutional restraint on commercial speech, and (4) the Act fails to contain a criminal intent provision.

We affirm the judgment.

FACTS

Appellant is the owner of patents for various solar energy heating and cooling devices which allegedly

---

[2] Section 1812.201, subdivision (a), defines a SAMP as follows: " 'Seller assisted marketing plan' means any sale or lease or offer to sell or lease any product, equipment, supplies, or services which requires a total initial payment exceeding five hundred dollars ($500), but requires an initial cash payment of less than fifty thousand dollars ($50,000), which will aid a purchaser or will be used by or on behalf of the purchaser in connection with or incidental to beginning, maintaining, or operating a business when the seller assisted marketing plan seller has advertised or in other manner solicited the purchase or lease of the seller assisted marketing plan and done any of the following acts: [¶] (1) Represented that the purchaser will earn, is likely to earn, or can earn an amount in excess of the initial payment paid by the purchaser for participation in the seller assisted marketing plan; [¶] (2) Represented that there is a market for the product, equipment, supplies, or services, . . . or anything, be it tangible or intangible, made, produced, fabricated, grown, bred, modified, or developed by the purchaser using, in whole or in part, the product, supplies, equipment, or services which were sold or leased or offered for sale or lease to the purchaser by the seller assisted marketing plan seller; or [¶] (3) Represented that the seller will buy back or is likely to buy back any product made, . . . by the purchaser. . . . "

reduce utility costs or produce "free" electricity. According to appellant, he chose not to profit from his patents by manufacturing the devices himself, but by selling "how to" materials to members of the general public, enabling them to manufacture, sell and install his patented devices. He made his solicitations under the name of CONSERVE Financial Services, a corporation in which he was president and majority stockholder.

Appellant advertised and sold his how-to material in the form of videotapes and printed materials such as blueprints and assembly instructions. The videotapes and printed materials were marketed and sold as three separate programs: manufacturing a solar energy system, selling the system, and installing the system. Each program could be purchased separately for $2,000, or all three programs could be purchased for $5,000. Potential purchasers could pay a deposit and take the tapes for 10 days before determining whether they wanted to pay the purchase price or return the tapes.

Appellant marketed his videotapes several ways. He conducted seminars, had CONSERVE representatives pass out brochures at a convention, and placed advertisements in the *New York Times*.

The tapes made the following claims. Appellant's solar energy devices would produce free air conditioning and heat, and could be used to air condition homes. Purchasers of the videotapes would learn how to build the devices, which were easy to assemble and could be constructed in a purchaser's garage. Purchasers would have access to a network of manufacturers and installers of the devices with whom they could buy equipment and

share information, and appellant would provide a list of names and phone numbers of network members. Although purchasers could obtain parts for the solar energy devices at any local hardware store, appellant would sell products and parts for the devices at reduced prices. Appellant would provide ongoing training programs where a representative would come to a purchaser's facility or garage to assist in constructing the devices. The blueprints and written instructions would enable purchasers to build and install the devices.[3]

Two purchasers of appellant's videotapes testified at his preliminary hearing. Their testimony indicates that appellant's solar energy systems could not be used for residences, written instructional materials were incomplete and conflicting, parts for manufacturing and installing the systems were not available from CONSERVE, and on-site training assistance and a list of the names and numbers of network members were refused by appellant or CONSERVE representatives upon request.

Furthermore, appellant failed to provide a written contract stating that the agreement to purchase the videotapes could be cancelled within three business days; and did not provide a disclosure statement indicating that the State of California did not approve of or endorse any

---

[3] Respondent contends that appellant also made the representation that purchasers would earn a profit in excess of their investment in the videotapes. However, neither respondent nor appellant provide any record references regarding such representation, and we have no duty to search the voluminous record in this case to look for the proverbial needle in the haystack.

SAMP, that appellant could not make any guarantee of earnings, that appellant was convicted of conversion and misappropriation of property, and that there was a judgment against CONSERVE in the State of Washington for violation of consumer protection laws involving deceptive business practices. Appellant further did not provide a description of the actual services he would perform for a purchaser, nor did he provide (and actually refused to provide) a financial statement for CONSERVE.

Appellant was charged with 38 counts of violating the SAMP Act, including wilfully failing to provide potential purchasers of a SAMP with an information sheet, a written contract with specified terms and conditions, and a disclosure statement; and wilfully failing to file an annual fee and disclosure statements with the California Attorney General. Appellant also was charged with 8 counts of grand theft (Pen. Code. § 487).

Pursuant to a plea bargain, appellant pled guilty to 8 counts of violating the SAMP Act in exchange for the dismissal of the remaining 38 counts. The SAMP Act violations included 2 counts of failing to provide a potential purchaser of a SAMP with a disclosure statement (Civ. Code, § 1812.205), 2 counts of failing to provide a potential purchaser of a SAMP with an information sheet (Civ. Code, § 1812.206), 2 counts of failing to provide a potential purchaser of a SAMP with a written contract containing mandatory provisions (Civ. Code, §§ 1812.207, 1812.209), and 2 counts of committing fraud in connections with the offer or sale of a SAMP (Civ. Code, § 1812.217).

Appellant obtained a certificate of probable cause to file this appeal.

DISCUSSION

SAMP Act Violations

Appellant states he does not dispute the sufficiency of the evidence. Yet, he contends that his videotape sales did not constitute the selling of a SAMP. (§ 1812.201.)

Violating a provision of the Act requires that a seller be involved in selling a SAMP. (§ 1812.200.) Since appellant pled guilty to violating the disclosure provisions of the Act, he has waived the issue of whether his videotape sales constituted a SAMP. A guilty plea constitutes a conclusive admission of every element of the offense charged. (*People v. DeVaughn* (1977) 18 Cal.3d 889, 895; *People v. Turner* (1985) 171 Cal.App.3d 116, 125-126.) Appellant could not be guilty of failing to disclose if he was not selling a SAMP.

Appellant argues that he admitted only that he sold the videotapes and not that he sold a SAMP, reserving the latter question for review on appeal as a "legal" issue. However, determining the question as a legal issue does not transform it into a reviewable matter since its determination would necessarily require an evaluation of the evidence. A guilty plea waives any right to raise questions regarding the evidence or to question how the evidence was obtained. (*People v. DeVaughn, supra,* 18 Cal.3d 895; *People v. Turner, supra,* 171 Cal.App.3d 125-126.)

Appellant counters that he reserved the right to have this issue heard on its merits on appeal pursuant to his

plea bargaining agreement and his filing of a certificate of probable cause. He contends the prosecutor agreed that he could challenge on appeal his intent to violate the Act.

Appellant has not supported this claim either factually or legally. His plea bargaining agreement merely provides that he did not waive the right to appeal. In addition, he does not specifically raise any claim of inducement to plea bargain in exchange for raising a noncognizable issue on appeal. (See *People v. turner, supra,* 171 Cal.App.3d 125, fn. 6.) A certificate of probable cause is not a license or guarantee giving defendant the right to have his case heard on its merits. Penal Code section 1237.5 merely provides the procedure for screening out frivolous claims among those issues *not* waived by the plea. (*People v. Kaanehe* (1977) 19 Cal.3d 1, 9.) It does not operate to expand the substantive issues which may be raised on appeal after a guilty plea.

Appellant further counters that, if he did not sell a SAMP, the SAMP Act was inapplicable to his conduct, therefore the trial court lacked jurisdiction over the charges in this case. Again, not so.

A certificate of probable cause does not allow defendant to raise issues on appeal occurring prior to entry of the plea, except those which question the jurisdiction, constitutionality, or legality of the proceedings resulting in the plea. (Pen. Code, § 1237.5; *People v. Kaanahe, supra,* 19 Cal.3d 8-9.)

Appellant implies that the trial court lacked fundamental jurisdiction over him. However, he does not argue that the information was improperly filed, nor does the

record so indicate. Instead, he implies that the trial court made an error of law in accepting his plea.

Assuming solely for argument sake that appellant's conduct was not violative of the Act, under the circumstances of this case the trial court could only have acted in excess of its *statutory* jurisdiction, but not in excess of its *fundamental* jurisdiction, i.e., a complete absence of authority with respect to the dispute. When an information is properly filed, the superior court has subject matter jurisdiction to hear and determine the charges. (*People v. Ellis* (1987) 195 Cal.App.3d 334, 343.)

Vagueness Claim

Appellant next challenges his convictions by asserting the SAMP Act is unconstitutionally vague and ambiguous in describing the conduct it proscribes. He believes the Act places no limitations against criminalizing lawful conduct, and thus can be enforced to punish innocent retail sales of goods and services. (See *United States v. Cardiff* (1952) 344 U.S. 174, 176 [criminal statutes which are vague can provide a "trap for the innocent"].) Appellant contends that, once a sale of his videotapes was consummated, there existed no further business between himself and the purchaser. Consequently, he claims, this transaction constituted a lawful retail sale, unlike a SAMP transaction which must continue to "bleed" the purchaser after the initial sale.[4]

[4] Appellant finds vagueness in the definition of a seller as "the person to whom the purchaser becomes contractually

(Continued on following page)

Again, the principles of waiver preclude us from dealing with the merits of this issue. In maintaining the

---

(Continued from previous page)

obligated," and the definition of a purchaser as "a person who is solicited to become obligated or does become obligated on a [SAMP] contract." However, he interprets the phrase "become obligated" to mean that, in order to be a SAMP seller, a seller must *financially* obligate purchasers beyond the initial purchase, such as requiring a purchaser to buy additional material or services. His interpretation appears to unjustifiably limit the scope of a SAMP transaction.

The prosecutor and trial judge agreed that the SAMP Act requires only an initial purchase or investment. The judge stated: "[The Act] doesn't say that there must be an ongoing obligation. . . . [¶] Now, since the statute doesn't require that there be this contractual obligation continuing later, . . . then it would seem to me that all the district attorney need prove in fact is that a person listening to this would say . . . ' Is my business success going to depend on this guy's continued assistance. . . . ?' [¶]. . . . [W]hat [the prosecutor] is saying- . . . what [appellant is] telling them, 'Basically you're going to be a success in this because we're going to continue to help you, we're going to continue to provide you with low-priced parts, we're going to provide you with further evidences to who else is in the business so you can work with them. We're going to provide you with a network of people who you can call upon when you need to install or whatever.' . . . [¶] The obligation was the original purchase. There's no obligation, I agree, on either the purchaser or the seller after the original obligation has been complied with. After you buy the tape, for example, there's no further legal obligation. . . . [¶] It seems to me the statute is saying if the person sold the first item with the representations that these other assists are going to happen, [then] he comes within the statute. . . . [¶]. . . . [The prosecutor] said that there was offer for future services and future help which were in essence that part of the sales pitch to sell the [solar energy] unit. . . . [¶]. . . . Even though [the purchaser doesn't] have a legal obligation, that was inducement to buy it. That's the seller-assisted marketing plan."

unconstitutionality of the SAMP Act under the vagueness doctrine, appellant premises this proposition upon his own alleged innocent acts. He in essence is claiming that the Act's language is so vague that it has resulted in the punishment of an innocent, namely himself.

Just because appellant has clothed his proposition in constitutional garb does not enable him to have it reviewed. Based as this issue is on his alleged innocent conduct, he plainly is not challenging the legal sufficiency of the proceedings (Pan. Code, § 1237.5). Attacks on appeal which go to defendant's guilt or innocence are removed from consideration by a guilty plea, whether or not the attack is founded on a constitutional violation. (*People v. Turner, supra,* 171 Cal.App.3d 125.)

Moreover, an analysis of a statute for vagueness in most cases involves an examination of the acts committed by defendant, for a court is not permitted to invalidate a statute merely because marginal acts may fall within its language. (*People v. Nguyen* (1984) 161 Cal.App.3d 687, 692-693.) Again, by pleading guilty, appellant has waived any right to have the facts of this case examined on appeal. (See *People v. Perry* (1984) 162 Cal.App.3d 1147, 1151.)[5] In view of his insistence on his innocence, one wonders why he did not elect trial to defend against the

---

[5] We do not thereby mean to imply that a defendant may never challenge a statute on constitutional vagueness grounds following a guilty plea. Such challenge possibly could be reviewed on its merits where the language of a statute is so patently ambiguous that it is rendered void for vagueness regardless of the nature of defendant's particular acts. That is not the case here. The statutory language is sufficiently specific to exclude transactions involving retail sales.

charges. Once electing to forego trial, he cannot be afforded a second chance to be judged innocent on appeal.

Commercial Restraint Claim

Appellant next challenges his convictions by arguing that the SAMP Act's disclosure and registration requirements impose a prior restraint on commercial speech in violation of the First Amendment to the United States Constitution.

We may review the merits of this point.

After pleading guilty, a defendant may raise only those questions on appeal which go to the power of the state to try him despite his guilt, that is, he may raise those grounds going to the legality of the proceedings. (Pen. Code, § 1237.5; *People v. Turner, supra,* 171 Cal.App.3d 126.) Since a guilty plea constitutes a break in the chain of events preceding it, the accused cannot raise claims of rights deprivations occurring prior to entry of the plea, *unless* he is complaining about the right not be hauled into court in the first place. (*People v. Turner, supra.*)

Here, appellant's contention that the SAMP Act violates the First Amendment does not require us to examine his conduct leading to the criminal charges. If the Act operates as an unconstitutional prior restraint of commercial speech, then appellant cannot be held liable for his crimes, no matter what acts he committed. (See *People v. Turner, supra,* 171 Cal.App.3d 126-127.)

"Commercial" speech is entitled to the protection of the First Amendment, although the protection is less extensive than that afforded "noncommercial" speech. (*Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626, 637.) Commercial expression not only serves the economic interest of the speaker, it assists consumers and furthers the societal interest in the fullest possible dissemination of information. (*Central Hudson Gas v. Public Service Comm'n* (1980) 447 U.S. 557, 561-562.) However, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government therefore may ban forms of commercial speech more likely to deceive the public than to inform it. (*Id.*, p. 563; *Zauderer v. Office of Disciplinary Counsel, supra,* p. 638 [government may prevent commercial speech that is false, deceptive or misleading].)

The SAMP Act is consumer protection scheme designed to regulate a lawful commercial activity, the selling of SAMPs. The Act is basically a disclosure statute. It requires the seller to disclose certain information in writing to prospective purchasers. This information must be filed with the State Attorney General's Office prior to the time the seller solicits purchasers. The purpose of the SAMP Act is to give purchasers complete and accurate information regarding SAMP sales.[6]

---

[6] Section 1812.200 states as follows: "(a) The Legislature finds and declares that the widespread sale of seller assisted marketing plans, often connected with the sale of . . . work-at-home paraphernalia, has created numerous problems in

(Continued on following page)

Appellant's specific objections to the Act are its requirements that the SAMP seller file his purchaser disclosures with the Attorney General's Office, and not make any representations to purchasers regarding the earning potential of a SAMP unless the representations are based on 10 prior SAMP sales by the seller. (§§ 1812.203, 1812.204, subd. (d).) Appellant contends that this creates a "catch 22" situation where the SAMP seller cannot sell without prior government registration, and yet cannot register without making any prior sales.

Appellant misreads the Act. Although a seller cannot solicit a purchaser without registering his purchaser disclosure statements, a seller is not prevented from soliciting a SAMP without prior sales. He merely cannot

---

(Continued from previous page)

California for purchasers. . . . Often purchasers . . . are individuals inexperienced in business matters who use their life savings to purchase the seller assisted marketing plan in the hope that they will earn enough money in addition to retirement income or salary to become or remain self-sufficient. . . . The initial payment is usually in the form of a purchase of overpriced equipment or products. California purchasers have suffered substantial losses when they have failed to receive full and complete information regarding the seller assisted marketing plan, . . . [¶] (b) It is the intent of this title to provide each prospective seller assisted marketing plan purchaser with the information necessary to make an intelligent decision regarding seller assisted marketing plans being offered; to safeguard the public against deceit and financial hardship; to insure, foster and encourage competition and fair dealing in the sale of seller assisted marketing plans by requiring adequate disclosure; to prohibit representations that tend to mislead; and to prohibit or restrict unfair contract terms. . . . "

represent that the SAMP has earning potential without evidence of the prior sales.

Moreover, appellant is incorrect that the Act deprives consumers of accurate information. It does just the opposite. It requires the SAMP seller to provide potential purchasers with information that the seller may not wish to provide, such as prior convictions for fraud, theft or misappropriation of property. Nowhere does the Act prohibit the dissemination of information.

Further, although arguing that the Act restricts the free exchange of ideas, appellant makes no reference to any specific information which he believes is wrongfully denied consumers. Disclosure requirements are one of the acceptable less restrictive alternatives to actual suppression of speech. (*Zauderer v. Office of Disciplinary Counsel, supra,* 471 U.S. 651-652, fn. 14.) Nor has appellant suggested that the Act's disclosure requirements are unduly burdensome which might result in the chilling of commercial speech. (*Id.*, p. 651.) It is true that the Act might prevent a person from soliciting a SAMP if that person did not want the required disclosures disseminated. However, we fail to see how that situation would be injurious to anyone.

Appellant's next contention, that the Act improperly presumes fraud by a SAMP seller by requiring the existence of 10 prior sales, is disingenuous. The requirement merely assures that the seller's representations of profit are based on the seller's past experience. And to some extent, all consumer protection statutes are based on the assumption that some fraud occurs in the marketplace.

Indeed, this is not an uncommon experience for consumers. (See § 1812.200.)

Appellant next asserts that the absence of any administrative procedures to assist SAMP sellers in challenging seller disclosure determinations by the State puts unbridled discretion into the hands of the Attorney General.

To the contrary, the Attorney General's Office makes no discretionary administrative decisions with regard to SAMP sales. The Act merely requires SAMP sellers to register their purchaser disclosure statements. Since no disclosure submitted to the State may be turned down, the Act does not attempt to regulate the content of the information in the disclosures except to require certain information applicable to a particular seller. It is up to each SAMP seller how much information he chooses to disclose. (See § 1812.205, providing that the SAMP seller shall include in his purchaser disclosure statement the following statement, "The information contained in this disclosure has not been checked by the state. If you have any questions about this purchase, see an attorney or other financial advisor before you sign a contract or agreement.")

We conclude that appellant has not established the SAMP Act is constitutionally infirm as a prior restraint on commercial speech.

Mens Rea Claim

Appellant finally argues that the Act fails to require a specific or criminal intent to violate its provisions, and

merely provides a criminal penalty for a "wilful" act. (§ 1812.217.) He reasons that, without a criminal intent requirement, the Act may improperly punish persons who have no knowledge that they are doing anything unlawful or even that they are selling a SAMP. He concludes that enforcement of the Act thereby threatens a broad spectrum of legitimate business.

His proposition is without merit.

There are some acts which threaten the social order or are rendered incapable of proof of criminal intent that in the interest of justice the legislature has provided the doing of the act constitutes a crime regardless of knowledge of the act or criminal intent on defendant's part. As to such crimes, it is defendant's duty to know what will result from his acts or conduct. (*In re Marley* (1946) 29 Cal.2d 525, 529.)

The SAMP Act is such a law. The word "wilful," when applied to the intent with which an act is done, does not require any intent to violate the law or to injure another, but means the purpose to commit the act which violates the law. (*People v. Mott* (1983) 140 Cal.App.3d 394, 402, citing Pen. Code, § 7 with regard to the "wilfulness" requirement in § 1812.217 of the SAMP Act.)

"The principle that knowledge of the unlawfulness of an act or omission is not required was recently reiterated by our Supreme Court in *People v. Snyder* (1982) 32 Cal.3d 590, 592-593 [citations omitted]: 'It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation thereof. Of course it is based on a fiction, because no man can know all the law, . . . The rule rests on public necessity; the welfare of society and

the safety of the state depend upon its enforcement. If a person accused of a crime could shield himself behind the defense that he was ignorant of the law which he violated, immunity from punishment would in most cases result.' " (*Id.*, p. 403.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

STONE, P.J.

We concur:

GILBERT, J.

YEGAN, J.

Robert J. Soares, Judge

Superior Court County of Ventura

Cohan & Greene and William A. Cohan for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Acting Assistant Attorney General, Keith H. Borjon, Supervising Deputy Attorney General, and Alison Braun, Deputy Attorney General, for Plaintiff and Respondent.

Second Appellate District, Division Six, No. B052314
S024462

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v. (Filed Feb. 20, 1992)

DENNIS MERLE LEE, Appellant

Appellant's petition for review DENIED.

BAXTER
Acting Chief Justice

CLIENT ___

CALENDARED Appeal 10/11/89

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA

JUDGE: ROBERT J. SOARES
DATE: SEPTEMBER 26, 1989
TIME: _____
CLERK: S. DeLESDERNIER
BAILIFF: _____
CASE NO: CR24072

TYPE OF CASE:

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

DENNIS M. LEE

WAC X
SS _
HMC X

(Received Sept. 29, 1989)

COHAN & GREEN

NATURE OF PROCEEDINGS: RULING ON SUBMITTER MATTER

The court now rules that the Seller Assisted Marketing Plan (Civ. Code § 1812.200 et seq.) legislation as applied to this case is constitutional. The defendant's motions to dismiss are each denied.

TO CLIENT 10/11/89

RICHARD D. DEAN,
County Clerk

By: /s/
Deputy County Clerk

CC-180 (REV. 1-83)

MINUTES

Title 2.7

CONTRACTS FOR SELLER ASSISTED MARKETING PLANS

Section

1812.200. Legislative finding and intent.

1812.201. Definitions.

1812.202. Offer in state.

1812.203. Filing disclosure statements and list of sales persons.

1812.204. Prohibited representations and activities.

1812.205. Disclosure statement.

1812.206. Information sheet.

1812.207. Written contracts; delivery of copies.

1812.208. Right to cancel; time; notice.

1812.209. Mandatory contract provisions.

1812.210. Notes; downpayment restrictions; escrow.

1812.211. Rights of purchaser against seller's assignee.

1812.212. Reference to compliance.

1812.213. Books, records and accounts; preservation of documents.

1812.214. Attorney to receive process; service of process; bond or trust account.

1812.215. Purchaser's right to void contract.

1812.216. Waiver of rights by purchaser; burden of proving exemption or exception from definitions.

1812.217. Violations; punishment.

1812.218. Damages.

1812.219. Additional remedies.

1812.220. Partial invalidity.

1812.221. Deposit in lieu of bond; claim against deposit; review and approval; payment; attachment, garnishment, or execution.

Title 2.7 was added by Stats.1978, c. 876, p. 2749, § 1.

§ 1812.200. Legislative finding and intent

(a) The Legislature finds and declares that the widespread sale of seller assisted marketing plans, often connected with the sale of vending machines, racks or work-at-home paraphernalia, has created numerous problems in California for purchasers which are inimical to good

business practice. Often purchasers of seller assisted marketing plans are individuals inexperienced in business matters who use their life savings to purchase the seller assisted marketing plan in the hope that they will earn enough money in addition to retirement income or salary to become or remain self-sufficient. Many purchasers are the elderly who are seeking a way to supplement their fixed incomes. The initial payment is usually in the form of a purchase of overpriced equipment or products. California purchasers have suffered substantial losses when they have failed to receive full and complete information regarding the seller assisted marketing plan, the amount of money they can reasonably expect to earn, and the previous experience of the seller assisted marketing plan seller. Seller assisted marketing plan sellers have a significant impact upon the economy and well-being of this state and its local communities. The provisions of this title relating to seller assisted marketing plans are necessary for the public welfare.

(b) It is the intent of this title to provide each prospective seller assisted marketing plan purchaser with the information necessary to make an intelligent decision regarding seller assisted marketing plans being offered; to safeguard the public against deceit and financial hardship; to insure, foster and encourage competition and fair dealing in the sale of seller assisted marketing plans by requiring adequate disclosure; to prohibit representations that tend to mislead; and to prohibit or restrict unfair contract terms. This title shall be construed liberally in order to achieve the foregoing purposes.

(Added by Stats.1978, c. 876, p. 2740, § 1.)

§ 1812.201. Definitions

For the purposes of this title, the following definitions shall be used:

(a) "Seller assisted marketing plan" means any sale or lease or offer to sell or lease any product, equipment, supplies or services which requires a total initial payment exceeding five hundred dollars ($500), but requires an initial cash payment of less than fifty thousand dollars ($50,000), which will aid a purchaser or will be used by or on behalf of the purchaser in connection with or incident to beginning, maintaining, or operating a business when the seller assisted marketing plan seller has advertised or any other manner solicited the purchase or lease of the seller assisted marketing plan and done any of the following acts:

(1) Represented that such purchaser will earn, is likely to earn, or can earn an amount in excess of the initial payment paid by the purchaser for participation in the seller assisted marketing plan;

(2) Represented that there is a market for the product, equipment, supplies, or services or anything, be it tangible or intangible, made, produced, fabricated, grown, bred, modified, or developed by the purchaser using, in whole or in part, the product, supplies, equipment or services which were sold or leased or offered for sale or lease to the purchaser by the seller assisted marking plan seller; or

(3) Represented that the seller will buy back or is likely to buy back any product made, produced, fabricated, grown or bred by the purchaser using, in whole or

in part, the product, supplies, equipment or services which were initially sold or leased or offered for sale or lease to the purchaser by the seller assisted marketing plan seller.

(b) A "seller assisted marketing plan" shall not include:

(1) A security defined in the Corporate Securities Law of 1968 (Division 1 (commencing with Section 25000) of Title 4 of the Corporations Code) which has been qualified for sale by the California Department of Corporations, or is exempt under Chapter 1 (commencing with Section 25100) of Part 2 of Division 1 of Title 4 of the Corporations Code from the necessity to qualify.

(2) A franchise defined by the Franchise Investment Law (Division 5 (commencing with Section 31000) of Title 4 of the Corporations Code) which is registered with the California Department of Corporations or is exempt under Chapter 1 (commencing with Section 3100) of Part 2 of Division 5 of Title 4 of the Corporations Code from the necessity of registering.

(3) Any transaction in which either the seller or purchaser or the lessor or lessee is licensed pursuant to and the transaction is governed by the Real Estate Law, Division 4 (commencing with Section 10000) of the Business and Professions Code.

(4) A license granted by the general merchandise retailer which allows the licensee to sell goods, equipment, supplies, products, or services to the general public under the retailer's trademark, trade name or service mark providing that the general merchandise retailer has

been doing business in this state continually for five years prior to the granting of the license and the general merchandise retailer also sells the same goods, equipment, supplies, products or services directly to the general public.

(5) A newspaper distribution system distributing newspapers as defined in Section 6362 of the Revenue and Taxation Code.

(6) A sale or lease to an existing or beginning business enterprise which also sells or leases equipment, products, supplies or performs services (i) which are not supplied by the seller and (ii) which the purchaser does not utilize with the equipment, products, supplies or services of the seller.

(7) The sale of an "ongoing business." An "ongoing business" is one which for at least six months previous to the sale: (i) has been operated from a given specific location, (ii) has been open for business to the general public and (iii) has had all equipment and supplies necessary for operating the business located at the given specific location.

(8) A sale or lease or offer to sell or lease to a purchaser: (i) who has for a period of at lest six months previously bought products, supplies, services or equipment which were sold under the same trademark or trade name or which were produced by the seller; and (ii) who has received on resale of such product, supplies, services or equipment an amount which is at least equal to the amount of the initial payment.

(9) The renewal or extension of an existing seller assisted marketing plan contract.

(c) "Person" includes an individual, corporation, partnership, joint venture or any business entity.

(d) "Seller" is a person who sells or leases or offers to sell or lease a seller assisted marketing plan and:

(1) Has sold or leased or represents or implies that the seller has sold or leased, whether in California or elsewhere, at least five seller assisted marketing plans within 24 months prior to a solicitation; or

(2) Intends or represents or implies that the seller intends to sell or lease, whether in California or elsewhere, at least five seller assisted marketing plans within 12 months following a solicitation.

For purposes of this title, the seller is the person to whom the purchaser becomes contractually obligated. A "seller" does not include a licensed real estate broker or salesman who engages in the sale or lease of a "business opportunity" as such term is used in Sections 10000 to 10030, inclusive, of the Business and Professions Code, or elsewhere in Chapter 1 (commencing with Section 10000), Chapter 2 (commencing with Section 10050), or Chapter 6 (commencing with Section 10450) of Part 1 of Division 4 of the Business and Professions Code.

(e) "Purchaser" means a person who is solicited to become obligated or does become obligated on a seller assisted marketing plan contract.

(f) "Equipment" includes machines, all electrical devices, video or audio devices, molds, display racks, vending machines, coin-operated game machines,

machines which dispense products and display units of all kinds.

(g) "Supplies" includes any and all materials used to produce, grow, breed, fabricate, modify, develop or make any product or item.

(h) "Product" includes any tangible chattel, including food or living animals, which the purchaser intends to:

(1) Sell or lease.

(2) Use to perform a service.

(3) Resell or attempt to resell to the seller assisted marketing plan seller.

(4) Provide or attempt to provide to the seller assisted marketing plan seller or to any other person whom the seller suggests the purchaser contact so that the seller assisted marketing plan seller or such other person may assist, either directly or indirectly, the purchaser in distributing, selling, leasing, or otherwise disposing of the product.

(i) "Services" includes any assistance, guidance, direction, work, labor or services provided by the seller to initiate or maintain or assist in the initiation or maintenance of a business.

(j) "Seller assisted marketing plan contract" or "contract" means any contract or agreement which obligates a purchaser to a seller.

(k) "Initial payment" means the total amount a purchaser is obligated to pay under the terms of the seller

assisted marketing plan contract prior to or at the time of delivery of the equipment, supplies, products or services or within six months of the purchaser commencing operation of the seller assisted marketing plan. If the contract sets forth a specific total sale price for purchase of the seller assisted marketing plan which total price is to be paid partially as a downpayment and then in specific monthly payments, the "initial payment" means the entire total sale price.

(l) "Initial cash payment" or "downpayment" means that portion of the initial payment which the purchaser is obligated to pay to the seller prior to or at the time of delivery of equipment, supplies, products, or services. It does not include any amount financed by or for which financing is to be obtained by the seller, or financing which the seller assists in obtaining.

(m) "Buy-back" or "secured investment" means any representation which implies in any manner that the purchaser's initial payment is protected from loss. Such terms include a representation or implication: (1) that the seller may repurchase either all or part of what it sold to the purchaser, or (2) that the seller may at some future time pay the purchaser the difference between what has been earned and the initial payment; or (3) that the seller may in the ordinary course buy from the purchaser items made, produced, fabricated, grown, bred, modified, or developed by the purchaser using, in whole or in part, the product, supplies, equipment, or services which were initially sold or leased to the purchaser by the seller; or (4) that the seller or a person to whom the seller will refer the purchaser may in the ordinary course sell, lease, or distribute the items the purchaser has for sale or lease.

(Added by Stats.1978, c. 876, p. 2749, § 1. Amended by Stats.1980, c. 567, p. 1554, § 1; Stats.1981, c. 258, p. 1324, § 1.)

§ 1812.202. Offer in state

(a) An offer to sell or offer to lease a seller assisted marketing plan shall occur in this state whenever:

(1) The offer to sell or offer to lease is made in this state;

(2) The purchaser resides in this state at the time of the offer; or

(3) The offer to sell or offer to lease either originates from this state or is directed by the seller or lessor to this state and received at the place to which it is directed.

(b) A sale or lease of a seller assisted marketing plan shall occur in this state whenever:

(1) The offer to sell or offer to lease is accepted in this state;

(2) The purchaser resides in this state at the time of the sale; or

(3) The acceptance is communicated to a seller situated in this state.

(Added by Stats.1978, c. 876, p. 2749, § 1.)

§ 1812.203. Filing disclosure statements and list of salespersons

The seller of any seller assisted marketing plan shall file with the Secretary of State a copy of the disclosure

statements required under Sections 1812.205 and 1812.206, as well as a list of the names and resident addresses of those individuals who sell the seller assisted marketing plan on behalf of the seller, prior to placing any advertisement or making any other representations to purchasers. The disclosure statements on file shall be updated through a new filing whenever material changes occur, but at least once a year. The list of sales people shall be updated through a new filing every six months.

(Added by Stats.1978, c. 876, p. 2749, § 1.)

§ 1812.204. Prohibited representations and activities

In selling, leasing, or offering to sell or lease a seller assisted marketing plan in this state, sellers shall not:

(a) Use the phrase "buy-back" or "secured investment" or similar phrase orally or in writing when a soliciting, offering, leasing, or selling a seller assisted marketing plan if the "security" is the value of the equipment, supplies, products, or services supplied by the seller to the purchaser.

(b) Use the phrase "buy-back" or "secured investment" or similar phrase orally or in writing when soliciting, offering, leasing, or selling a seller assisted marketing plan unless there are no restrictions or qualifications whatsoever preventing or limiting a purchaser from being able to invoke the "buy-back" or "secured" portion of the seller assisted marketing plan contract at any time the purchaser desires during the one-year period following the contract date. Upon invocation of the "buy-back" or "security" provision, the minimum amount a purchaser shall be entitled to have returned to

him is the full amount of his initial payment, less the amount actually received by him from the operation of the seller assisted marketing plan. The "amount actually received" means either the amount the purchaser actually obtained from the seller for any product resold to the seller or the amount of money the purchaser received for use of the purchaser's product, equipment, supplies or services, less any amount: (1) the purchaser has paid the owner or manager of the location at which the purchaser's products, equipment, supplies or services are placed; and (2) the purchaser has paid to obtain other items needed in order to sell, make, produce, fabricate, grow, breed, modify, or develop the item which the seller assisted marketing plan purchaser intends to sell, lease, distribute, or otherwise dispose of.

(c) Represent that a purchaser's initial payment is "secured" in any manner or to any degree or that the seller provides a "buy-back" arrangement unless the seller has, in conformity with subdivision (b) of Section 1812.214, either obtained a surety bond issued by a surety company admitted to do business in this state or established a trust account at a federally insured bank or savings and loan association located in this state.

(d) Represent that the seller assisted marketing plan provides income or earning potential of any kind unless the seller has data to substantiate the claims of income or earning potential and discloses this data to the purchaser at the time the claim is made, if made in person, or if made through written or telephonic communication, at the first in-person communication thereafter and, when disclosed, the data is left with the purchaser. A mathematical computation of the number of sales multiplied by

the amount of profit per sale to reach a projected income figure is not sufficient data to substantiate an income or earning potential claim. Income or earning potential claims cannot be made or implied at all unless they are based on the experience of at least 10 purchasers from the seller assisted marketing plan being offered. The data left by the seller must, at a minimum, disclose:

(1) The length of time the seller has been selling the particular seller assisted marketing plan being offered;

(2) The number of purchasers from the seller known to the seller to have made at least the same sales, income or profits as those represented; and

(3) The percentage the number represents of the total number of purchasers from the seller.

(e) Use the trademark, service mark, trade name, logo type, advertising or other commercial symbol of any business which does not either control the ownership interest in the seller or accept responsibility for all representations made by the seller in regard to the seller assisted marketing plan, unless the nature of the seller's relationship to such other business entity is set forth immediately adjacent to and in type size equal to or larger than that used to depict the commercial symbol of such other business. If a member of a trade association, the seller may use the logo or registration mark of the trade association in advertisements and materials without regard to this subdivision.

(f) Place or cause to be placed any advertisement for a seller assisted marketing plan which does not include the actual business name of the seller, and if it

differs, the name under which the seller assisted marketing plan is operated and the street address of the principal place of business of the seller.

(Added by Stats.1978, c. 876, p. 2749, § 1. Amended by Stats.1981, c. 258, p. 1327, § 2.)

§ 1812.205. Disclosure statement

At the first in-person communication with a potential purchaser or in the first written response to an inquiry by a potential purchaser, whichever occurs first, wherein the seller assisted marketing plan is described, the seller or his or her representative shall provide the prospective purchaser a written document, the cover sheet of which is entitled in at least 16-point boldface capital letters "DISCLOSURE REQUIRED BY CALIFORNIA LAW." Under the title shall appear in boldface of at least 10-point type, the statement: "The State of California has not reviewed and does not approve, recommend, endorse or sponsor any seller assisted marketing plan. The information contained in this disclosure has not been checked by the state. If you have any questions about this purchase, see an attorney or other financial adviser before you sign a contract or agreement." Nothing shall appear on the cover sheet except the title and the statement required above. The disclosure document shall contain the following information:

(a) The name of the seller, the name under which the seller is doing or intends to do business and the name of any parent or affiliated company that will engage in business transactions with purchasers or accept responsibility for statements made by the seller.

(b) A statement of the initial payment to be paid by the purchaser to the seller, or when not known, a statement of the approximate initial payment charged, the amount of the initial payment to be paid to a person inducing, directly or indirectly, a purchaser to contract for the seller assisted marketing plan.

(c) A full and detailed description of the actual services the seller will undertake to perform for the purchaser.

(d) When the seller makes any statement concerning earnings or range of earnings that may be made through the seller assisted marketing plan, he must comply with subdivision (d) of Section 1812.204 and set forth in complete form in this disclosure statement the following:

"No guarantee of earnings or ranges of earnings can be made. The number of purchasers who have earned through this business an amount in excess of the amount of their initial payment is at least ___, which represents ___ percent of the total number of purchasers of this seller assisted marketing plan."

(e) If training of any type is promised by the seller, a complete description of the training and the length of the training.

(f) If the seller promises services to be performed in connection with the placement of the equipment, product or supplies at a location from which they will be sold or used, the full nature of those services as well as the nature of the agreements to be made with the owner or

manager of the location at which the purchaser's equipment, product or supplies will be placed, must be set forth.

(g) If the seller represents orally or in writing when soliciting or offering for sale or lease or selling or leasing a seller assisted marketing plan that there is a "buy-back" arrangement or that the initial payment is in some manner protected from loss or "secured," the entire and precise nature of the "buy-back", "protection" or "security" arrangement shall be completely and clearly disclosed.

(Added by Stats.1978, c. 876, p. 2749, § 1. Amended by Stats.1981, c. 258, p. 1329, § 3.)

§ 1812.206. Information sheet

At least 48 hours prior to the execution of a seller assisted marketing plan contract or agreement or at least 48 hours prior to the receipt of any consideration, whichever occurs first, the seller or his or her representative shall provide to the prospective purchaser in writing a document entitled "SELLER ASSISTED MARKETING PLAN INFORMATION SHEET." The seller may combine the information required under this section with the information required under Section 1812.205 and, if done, shall utilize the single title "DISCLOSURES REQUIRED BY CALIFORNIA LAW," and the title page required by Section 1812.205. If a combined document is used, it shall be given at the time required by Section 1812.205, provided that such time meets the 48-hour test of this section. The information sheet required by this section shall contain the following:

(a) The name of the office held by the seller's officers, directors, trustees and general or limited partners, as the case may be, and the names of those individuals who have management responsibilities in connection with the seller's business activities.

(b) A statement whether any person identified in subdivision (a):

(1) Has been convicted of a felony or misdemeanor or pleaded nolo contendere to a felony or misdemeanor charge if such felony or misdemeanor involved an alleged violation of this title, fraud, embezzlement, fraudulent conversion or misappropriation of property.

(2) Has been held liable in a civil action by final judgment or consented to the entry of a stipulated judgment if the civil action alleged a violation of this title, fraud, embezzlement, fraudulent conversion or misappropriation of property or the use of untrue or misleading representations in an attempt to sell or dispose of real or personal property or the use of unfair, unlawful or deceptive business practices.

(3) Is subject to any currently effective injunction or restrictive order relating to business activity as the result of an action brought by a public agency or department, including, but not limited to, action affecting any vocational license.

The statements required by paragraphs (1), (2) and (3) of this subdivision shall set forth the court, the docket number of the matter, the date of the conviction or of the

judgment and, when involved, the name of the governmental agency that brought the action resulting in the conviction of judgment.

(4) Has at any time during the previous seven fiscal years filed in bankruptcy, been adjudged a bankrupt, been reorganized due to insolvency, or been a principal, director, officer, trustee, general or limited partner, or had management responsibilities of any other person, as defined in subdivision (b) of Section 1812.201, that has so filed or was so adjudicated or reorganized, during or within one year after the period that the individual held such position. If so, the name and location of the person having so filed, or having been so adjudged or reorganized, the date thereof, the court which exercised jurisdiction, and the docket number of the matter shall be set forth.

(c) The length of time the seller:

(1) Has sold seller assisted marketing plans.

(2) Has sold the specific seller assisted marketing plan being offered to the purchaser.

(d) If the seller is required to secure a bond or establish a trust account pursuant to the requirements of Section 1812.204, the information sheet shall state either:

(1) "Seller has secured a bond issued by

_____,

(name and address of surety company)

a surety company admitted to do business in this state. Before signing a contract to purchase this seller assisted

marketing plan, you should check with the surety company to determine the bond's current status," or

(2) "Seller has deposited with the office of the Secretary of State, State Capitol, Sacramento, California 95814, information regarding its trust account. Before signing a contract to purchase this seller assisted marketing plan, you should check with the Secretary of State to determine the current status of the trust account."

(e) A copy of a recent, not more than 12 months old, financial statement of the seller, together with a statement of any material changes in the financial condition of the seller from the date thereof. Such financial statement shall either be audited or be under penalty of perjury signed by one of the seller's officers, directors, trustees or general or limited partners. The declaration under penalty of perjury shall indicate that to the best of the signatory's knowledge and belief the information in the financial statement is true and accurate; the date of signature and the location where signed shall also be indicated. Provided, however, that where a seller is a subsidiary of another corporation which is permitted by generally accepted accounting standards to prepare financial statements on a consolidated basis, the above information may be submitted in the same manner for the parent if the corresponding financial statement of the seller is also provided and the parent absolutely and irrevocably has agreed to guarantee all obligations of the seller.

(f) An unexecuted copy of the entire seller assisted marketing plan contract.

(Added by Stats.1978, c. 876, p. 2749, § 1. Amended by Stats.1981, c. 258, p. 1330, § 4.)

§ 1812.207. Written contracts; delivery of copies

Every contract for sale or lease of a seller assisted marketing plan in this state shall be in writing and shall be subject to the provisions of this title. A copy of the fully completed contract and all other documents the seller requires the purchaser to sign shall be given to the purchaser at the time they are signed.

(Added by Stats.1978, c. 876, p. 2749, § 1.)

§ 1812.208. Right to cancel; time; notice

The purchaser shall have the right to cancel a seller assisted marketing plan contract for any reason at any time within three business days of the date the purchaser and the seller sign the contract. The notice of the right to cancel and the procedures to be followed when a contract is canceled shall comply with Section 1812.209.

(Added by Stats.1978, c. 876, p. 2749, § 1.)

1812.209. Mandatory contract provisions

Every seller assisted marketing plan contract shall set forth in at least 10-point type or equivalent size if hand-written, all of the following:

(a) The terms and conditions of payment including the initial payment, additional payments, and downpayment required.

(b) Immediately above the place at which the purchaser signs the contract the following notification, in boldface type, of the purchaser's right to cancel the contract:

"You have three business days in which you may cancel this contract for any reason by mailing or delivering written notice to the seller assisted marketing plan seller. The three business days shall expire on _____

_____

(last date to mail or deliver notice)

and notice of cancellation should be mailed or delivered to _____.

(seller assisted marketing plan seller's name and business street address)

If you choose to mail your notice, it must be placed in the United States mail properly addressed, first-class postage prepaid, and postmarked before midnight of the above date. If you choose to deliver your notice to the seller directly, it must be delivered to him by the end of his normal business day on the above date. Within five business days of receipt of the notice of cancellation, the seller shall return to the purchaser all sums paid by the purchaser to the seller pursuant to this contract. Within five business days after receipt of all such sums, the purchaser shall make available at his address or at the place at which they were caused to be located, all equipment, products and supplies provided to the purchaser pursuant to this contract. Upon demand of the seller, such equipment, products and supplies shall be made available at the time the purchaser receives full repayment by cash, money order or certified check."

(c) A full and detailed description of the acts or services the seller will undertake to perform for the purchaser.

(d) The seller's principal business address and the name and the address of its agent, other than the Secretary of State, in the State of California authorized to receive service of process.

(e) The business form of the seller, whether corporate, partnership or otherwise.

(f) The delivery date or, when the contract provides for a staggered delivery of items to the purchaser, the approximate delivery date of those products, equipment or supplies the seller is to deliver to the purchaser to enable the purchaser to begin or maintain his business and whether the products, equipment or supplies are to be delivered to the purchaser's home or business address or are to be placed or caused to be placed by the seller at locations owned or managed by persons other than the purchaser.

(g) A complete description of the nature of the "buy-back", "protection", or "security" arrangement, if the seller has represented orally or in writing when selling or leasing, soliciting or offering a seller assisted marketing plan that there is a "buy-back" or that the initial payment or any part of it is "protected" or "secured."

(h) A statement which accurately sets forth a purchaser's right to void the contract under the circumstances and in the manner set forth in subdivisions (a) and (b) of Section 1812.215.

(i) The name of the supplier and the address of such supplier of the products, equipment, or supplies the seller is to deliver to the purchaser to enable the purchaser to begin or maintain his business.

(Added by Stats.1978, c. 876, p. 2749, § 1. Amended by Stats.1981, c. 258, p. 1332, § 5.)

§ 1812.210. Notes; downpayment restrictions; escrow

(a) No seller assisted marketing plan contract shall require or entail the execution of any note or series of notes by the purchaser which, when separately negotiated, will cut off as to third parties any right of action or defense which the purchaser may have against the seller.

(b) If the contract referred to in Section 1812.209 provides for a downpayment to be paid to the seller, the downpayment shall not exceed 20 percent of the initial payment amount. In no event shall the contract payment schedule provide for the seller to receive more than 20 percent of the initial payment before delivery to the purchaser, or to the place at which they are to be located, the equipment, supplies or products, unless all sums in excess of 20 percent are placed in an escrow account which cannot be released until the purchaser notifies the escrow agent in writing of the delivery of such equipment, supplies or products or the seller notifies the escrow agent, by presenting the agent with a bill of lading, which proves shipment of the equipment, supplies, or products as required by and within the time limits set forth in the seller assisted marketing plan contract. Notification of delivery by the purchaser to the escrow agent shall not be unreasonably withheld.

(Added by Stats.1978, c. 876, p. 2749, § 1. Amended by Stats.1981. c. 258. p.1333, § 6.)

§ 1812.211. Rights of purchaser against seller's assignee

Any assignee of the seller assisted marketing plan contract or the seller's rights is subject to all equities, rights and defenses of the purchaser against the seller.

(Added by Stats.1978, c. 876, p. 2749, § 1.)

§ 1812.212. Reference to compliance

No seller shall make or authorize the making of any reference to its compliance with this title.

(Added by Stats.1978, c. 876, p. 2749, § 1.)

§ 1812.213. Books, records and accounts; preservation of documents

Every seller shall at all times keep and maintain a complete set of books, records and accounts of seller assisted marketing plan sales made by the seller. All documents relating to each specific seller assisted marketing plan sold or leased shall be maintained for four years after the date of the seller assisted marketing plan contract.

(Added by Stats.1978, c. 876, p. 2749, § 1.)

§ 1812.214. Attorney to receive process; service of process; bond or trust account

(a) Every seller of seller-assisted marketing plans other than a California corporation shall file with the Secretary of State an irrevocable consent appointing the Secretary of State or successor in office to act as the seller's attorney to receive service or any lawful process in any noncriminal suit, action or proceeding against the seller or the seller's successor, executor or administrator, which may arise under this title. When service is made upon the Secretary of State, it shall have the same force and validity as if served personally on the seller. Service may be made by leaving a copy of the process in the office of the Secretary of State, but it shall not be effective unless:

(1) The plaintiff forthwith sends by first-class mail a notice of the service upon the Secretary of State and a copy of the process to the defendant or respondent at the last address on file with the Secretary of State; and

(2) The plaintiff's affidavit of compliance with this section is filed in the case on or before the return date of the process, if any, or within such further time as the court allows.

(b) If, pursuant to subdivision (c) of Section 1812.204, a seller must obtain a surety bond or establish a trust account, the following procedures apply:

(1) If a bond is obtained, a copy of it shall be filed with the office of the Secretary of State; if a trust account is established, notification of the depository, the trustee

and the account number shall be filed with the office of the Secretary of State.

(2) The bond or trust account required shall be in favor of the State of California for the benefit of any person who is damaged by any violation of this title or by the seller's breach of a contract subject to this title or of any obligation arising therefrom. The trust account shall also be in favor of any person damaged by such practices.

(3) Any person claiming against the trust account for a violation of this title may maintain an action at law against the seller and the trustee. The surety or trustee shall be liable only for actual damages and not the punitive damages permitted under Section 1812.218. The aggregate liability of the trustee to all persons damaged by a seller's violation of this title shall in no event exceed the amount of the trust account.

(4) The bond or the trust account shall be in an amount equal to the total amount of the "initial payment" section of all seller-assisted marketing plan contracts the seller has entered into during the previous year or three hundred thousand dollars ($300,000), whichever is less, but in no case shall the amount be less than fifty thousand dollars ($50,000). The amount required shall be adjusted twice a year, no later than the tenth day of the first month of the seller's fiscal year and no later than the tenth day of the seventh month of the seller's fiscal year. A seller need only establish a bond or trust account in the amount of fifty thousand dollars ($50,000) at the commencement of business and during the first six months the seller is in business. By the tenth day of the seller's seventh month in business, the amount of the bond or

trust account shall be established as provided for herein as if the seller had been in business for a year.

(Added by Stats.1978, c. 876, p. 2749, § 1. Amended by Stats.1981, c. 258, p. 1333, § 7; Stats.1982, c. 517, p. 2322, § 64.)

§ 1812.215. Purchaser's right to void contract

(a) If a seller uses any untrue or misleading statements to sell or lease a seller assisted marketing plan, or fails to comply with Section 1812.203, or fails to give the disclosure documents or disclose any of the information required by Sections 1812.205 and 1812.206, or the contract does not comply with the requirements of this title, then within one year of the date of the contract at the election of the purchaser upon written notice to the seller, the contract shall be voidable by the purchaser and unenforceable by the seller or his assignee as contrary to public policy and the purchaser shall be entitled to receive from the seller all sums paid to the seller when the purchaser is able to return all equipment, supplies or products delivered by the seller; when such complete return cannot be made, the purchaser shall be entitled to receive from the seller all sums paid to the seller less the fair market value at the time of delivery of the equipment, supplies or products not returned by the purchaser, but delivered by the seller. Upon the receipt of such sums, the purchaser shall make available to the seller at the purchaser's address or at the places at which they are located at the time the purchaser gives notice pursuant to this section, the products, equipment or supplies received by the purchaser from the seller. Provided, however, if

the seller inadvertently has failed to make any of the disclosures required by Section 1812.205 or 1812.206 or the contract inadvertently fails to comply with the requirements of this title, the seller may cure such inadvertent defect by providing the purchaser with the correct disclosure statements or contract if at the time of providing such correct disclosures or contract the seller also informs the purchaser in writing that because of the seller's error, the purchaser has an additional 15-day period after receipt of the correct disclosures or contract within which to cancel the contract and receive a full return of all moneys paid in exchange for return of whatever equipment, supplies or products the purchaser has. If the purchaser does not cancel the contract within 15 days after receipt of the correct disclosures or contract, he may not in the future exercise his right to void the contract under this section due to such noncompliance with the disclosure or contract requirements of this title.

(b) If a seller fails to deliver the equipment, supplies or product within 30 days of the delivery date stated in the contract, unless such delivery delay is beyond the control of the seller, then at any time prior to delivery or within 30 days after delivery, at the election of the purchaser upon written notice to the seller, the contract shall be voidable by the purchaser and unenforceable by the seller or his assignee as contrary to public policy.

The rights of the purchaser set forth in this section shall be cumulative to all other rights under this title or otherwise.

(Added by Stats.1978, c. 876, p. 2749, § 1. Amended by Stats.1981, c. 258, p. 1334, § 8.)

§ 1812.216. Waiver of rights by purchaser; burden of proving exemption or exception from definitions

(a) Any waiver by a purchaser of the provisions of this title shall be deemed contrary to public policy and shall be void and unenforceable. Any attempt by a seller to have a purchaser waive rights given by this title shall be a violation of this title.

(b) In any proceeding involving this title, the burden of proving an exemption or an exception from a definition is upon the person claiming it.

(Added by Stats.1978, c. 876, p. 2749, § 1. Amended by Stats.1981, c. 258, p. 1335, § 9.)

§ 1812.217. Violations; punishment

Any person, including, but not limited to, the seller, a salesman, agent or representative of the seller or an independent contractor who attempts to sell or lease or sells or leases a seller assisted marketing plan, who willfully violates any provision of this title or employs, directly or indirectly, any device, scheme or artifice to deceive in connection with the offer or sale of any seller assisted marketing plan, or willfully engages, directly or indirectly, in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person in connection with the offer, purchase, lease or sale of any seller assisted marketing plan shall, upon conviction, be fined not more than ten thousand dollars ($10,000) for each unlawful transaction, or imprisoned in the state prison, or imprisoned in county jail for not more

than one year, or be punished by both such fine and imprisonment.

(Added by Stats.1978, c. 876, p. 2749, § 1.)

§ 1812.218. Damages

Any purchaser injured by a violation of this title or by the seller's breach of a contract subject to this title or of any obligation arising from the sale or lease of the seller assisted marketing plan may bring any action for recovery of damages. Judgment shall be entered for actual damages, plus reasonable attorney's fees and costs, but in no case shall the award of damages be less than the amount of the initial payment provided the purchaser is able to return all the equipment, supplies or products delivered by the seller; when such complete return cannot be made, the minimum award shall be no less than the amount of the initial payment less the fair market value at the time of delivery of the equipment, supplies or products that cannot be returned but were actually delivered by the seller. An award, if the trial court deems it proper, may be entered for punitive damages.

(Added by Stats.1978, c. 876, p. 2749, § 1.)

§ 1812.219. Additional remedies

The provisions of this title are not exclusive. The remedies provided herein for violation of any section of this title or for conduct proscribed by any section of this title shall be in addition to any other procedures or remedies for any violation or conduct provided for in any other law.

Nothing in this title shall limit any other statutory or any common law rights of the Attorney General, any district attorney or city attorney, or any other person. If any act or practice proscribed under this title also constitutes a cause of action in common law or a violation of another statute, the purchaser may assert such common law or statutory cause of action under the procedures and with the remedies provided for in such other law.

(Added by Stats.1978, c. 876, p. 2749, § 1.)

§ 1812.220. Partial invalidity

If any provision of this act or if any application thereof to any person or circumstance is held unconstitutional, the remainder of the title and the application of such provision to other persons and circumstances shall not be affected thereby.

(Added by Stats.1978, c. 876, p. 2749, § 1.)

§ 1812.221. Deposit in lieu of bond; claim against deposit; review and approval; payment; attachment, garnishment, or execution

(a) When a deposit has been made in lieu of bond pursuant to paragraph (1) of subdivision (b) of Section 1812.214 and Section 995.710 of the Code of Civil Procedure, the person asserting a claim against the deposit shall, in lieu of the provisions of Section 996.430 of the Code of Civil Procedure, establish the claim by furnishing evidence to the Secretary of State of a money judgment

entered by a court together with evidence that the claimant is a person described in paragraph (2) of subdivision (b) of Section 1812.214.

(b) When a person has completely established the claim with the Secretary of State, the Secretary of State shall forthwith review and approve the claim and enter the date of approval thereon. The claim shall be designated an "approved claim."

(c) When the first claim against a particular deposit account has been approved, it shall not be paid until the expiration of a period of 240 days after the date of its approval by the Secretary of State. Subsequent claims which are approved by the Secretary of State within the same 240-day period shall similarly not be paid until the expiration of the 240-day period. Forthwith upon the expiration of the 240-day period, the Secretary of State shall pay all approved claims from the 240-day period in full unless there are insufficient funds in the deposit account in which case each approved claim shall be paid a proportionate amount to exhaust the deposit account.

(d) When the Secretary of State approves the first claim against a particular deposit account after the expiration of a 240-day period, the date of approval of that claim shall begin a new 240-day period to which subdivision (c) shall apply with respect to the amount remaining in the deposit account.

(e) After a deposit account is exhausted, no further claims shall be paid by the Secretary of State. Claimants who have had their claims paid in full or in part pursuant to subdivisions (c) and (d) shall not be required to make a

contribution back to the deposit account for the benefit of other claimants.

(f) When a deposit has been made in lieu of bond, the amount of the deposit shall not be subject to attachment, garnishment, or execution with respect to an action or judgment against the seller, other than as to an amount as no longer needed or required for the purpose of this title which would otherwise be returned to the seller by the Secretary of State.

(Added by Stats.1984, c. 545, § 4.)

* * *

[p. 75] that that is a seller-assisted plan, then it seems to me that the Defendant needs that.

MR. POPOV: Where is the obligation?

THE COURT: The obligation was the original purchase. There's no obligation. I agree, on either the purchaser or the seller after the original obligation has been complied with. After you buy the tape, for example, there's no further legal obligation between the two.

MR. POPOV: But then it's an executory contract, and there was no obligation other than to pay for something you bought.

THE COURT: It seems to me the statute is saying if the person sold the first item with the representations that these other assists are going to happen, that he comes within the statute.

MR. POPOV: Without any obligation?

THE COURT: Without any legal obligation upon either the buyer or the seller, because I keep looking for that in the statute which makes that tail that it seems to me that you're urging me to buy. I don't see that in the statute, although it seems to me that as I said originally when I first started this discussion with you people that that seems to me to have been the original intention to prevent or to regulate, but I don't think they made it in the statute.

I think what they're really saying is where the sellers sell with that concept, buy there and I'll [p. 76] help you in the future, and I think what they're trying to do is to

regulate those people who are going to go out to the marketplace and say "Buy there, I'll help you in the future" without having some assurances that this person is the type of person who can and will carry on the help in the future, and that's why we regulate them.

MR. POPOV: I guess – I guess the only problem I have with that line of reasoning, if you're following that line of reasoning, is in the criminal section it says anybody that sells, seller-assisted marketing plan and going back and looking at the definition, it still means that this obligates a purchaser to a seller, and I just can't see if you and I – if I buy a car from you, I mean we're done, the transaction is over.

THE COURT: If I sold you a car –

MR. POPOV: There is no obligation.

THE COURT: Let's assume I sold you a car and I said, now, in addition to this car, Bob, that I've sold you is a great car, what I'm going to do for you is that I'm going to continue to repair it for free or I'm going to give parts at half price. I'm going to give you parts for half price for as long as you own the car and – or I'm not sure that would be a business.

So I think – let's assume you sell me a car rental business, you sell me a car rental business and part of it is, Bob, in order to keep your cars running, you don't have to pay the cost of the local mechanics because our plan includes a mechanics-assisted

* * *

[p. 739] Q. Okay. What was your position for C.O.N.S.E.R.V.E. Financial Services and when did you first assume those duties?

A. Uh, when I was first hired, I believe I was hired as sort of a sales assistant, and that kind of developed into an administrative assistant position. So that would have been in December I believe of '87.

Q. Okay. And later in December of 1987, did you have a telephone conversation with a person who identified himself as Sergeant Bruce McDowell?

A. Yes, sir.

Q. Can you tell the Court what was said and by whom during that conversation?

A. Yes. I had been referred to – well, actually what had happened is that one of the people I had been talking to about the program had informed me that calls being made to the Better Business Bureau were being referred to the Sheriff's Department.

Q. So we don't have a motion to strike, I want to retroactively ask the question. Why did you call Sergeant McDowell?

A. Oh, okay.

Q. It wasn't really responsive. I know you were giving the reason why you called Sergeant McDowell there.

A. Again, because I had received information that calls to the Better Business Bureau about [p. 740] C.O.N.S.E.R.V.E. were being referred to the Sheriff's

Department. So I called the Better Business Bureau to see if that was true, and I was in fact referred to Sergeant McDowell.

Q. Okay. Then you called Sergeant McDowell?

A. Yes. Uh –

Q. That's correct, isn't it?

A. Yes, it is.

Q. Do you know whether that was on or about December the 22nd of 1987?

A. It would have been on or about that time, yes.

Q. Okay.

Now, can you tell the Court – and thank you for making a foundation in spite of my questioning for the call – what was said by and between you and Sergeant McDowell on that date?

A. I called him and – and basically at first I more or less acted like I was – just had been referred to him like a customer of the company. And he asked me my name and address.

I went on and let him know that I was an employee of the company and that I was an ex-police officer and I had become concerned that the calls were being referred to him. And being an ex-police officer, I definitely did not want to be connected or work for a company where there was a problem, so I asked him what the problem was.

[p. 741] He told me that basically the Better Business Bureau had been receiving a whole lot of phone calls and

that they did – they had just become curious about what was going on.

At that time I said, "Well, fine. Let me tell you what's going on."

And I went through and explained exactly what the company was about, what the kits were being sold, how it worked, everything that I could – could remember and tell him at that point in time.

Q. Did Sergeant McDowell tell you that he had received any videotapes of Mr. Lee, the Greatest Energy Show on Earth and The Network Opportunity tape, or indicate that he had conducted any investigation prior to his telephone conversation with you?

A. No.

MS. DEAN: Objection; relevancy.

THE COURT: Overruled.

THE WITNESS: No, he did not give me any indication that he had seen or heard or had any information whatsoever.

BY MR. COHAN:

Q. All right. And did you essentially recite the details of what the company was marketing and how they were going about doing it?

A. Yes. I –

Q. Continue then with the conversation if you would.

[p. 742] A. The major question I remember him asking me is whether or not once a person had purchased

a kit if they had to operate or be connected with the company; in other words, if they had to – do they have to do business with the company in order to be in business.

And I informed him that no, they did not. They had the full right to operate totally independent.

They could, however, get parts perhaps cheaper and so on and services cheaper through the company, but they were free to choose any source that they wished.

Q. Did Sergeant McDowell respond to your question about whether there was anything wrong with what the company was doing?

A. At first when he – the – when I first brought that up, he said that basically all that they were just curious as to what was going on, not that there was an investigation or anything. He didn't say investigation. But it was basically saying "Well, we're just curious about what's going on. That's the reason that the calls are being made."

After our discussion and my explanation and his question, he basically told me then that he saw nothing wrong with the company, everything seemed find, uh, that he would call the D. A.'s Office and tell them there was nothing to be concerned about, [p. 743] that he would call the Better Business Bureau and tell them to stop referring calls to him because he didn't want to end up doing my job.

Q. Do you recall anything else about that conversation?

A. No. That was basically it. He didn't ask me any questions as to whether or not I observed anything incorrect or unusual about the company and – and that was basically the gist of the conversation.

Q. Okay. Did you express to him – strike that.

Did you draw any conclusions as to whether there was any legal impropriety in what Dennis Lee was doing or what you were doing on behalf of Dennis Lee?

A. No, I did not. And of course after my discussion with Sergeant McDowell, I figured he had given our operation a clean bill of health.

Q. Okay.

Prior to your discussion with Sergeant McDowell, was there anything other than the referrals from the Better Business Bureau to the Sheriff's Department that had indicated to you that there might be something legally improper about CFS or Dennis Lee's operation?

A. No.

Q. Okay.

Were you present when the search and

* * *

[p. 1440] whether that means you understand or you don't understand.

THE DEFENDANT: It means that I am reasonably sure I understand and that I have only one other question. And that is on that matter, that is the restitution to people on other charges that were brought, I would have, as I understand it, exposure to any of the other

charges, even though I am not pleading guilty to them to restitute them where they would be found to need restitution by your Honor.

THE COURT: That's right.

THE DEFENDANT: But that does not relate to anything outside of any charges brought or anything?

THE COURT: That's right. It must relate to the charges that are set forth in the Information.

THE DEFENDANT: I understand that, your Honor.

THE COURT: Any other questions?

THE DEFENDANT: And I don't object to that, either.

THE COURT: Do you have any other questions?

THE DEFENDANT: Yes, I do.

I had another question, your Honor. I may already have the answer to this too, and if I do, I apologize for wasting your time.

It has just been brought to my attention, and I imagine it's the only way to do it, that in doing this I know a key issue is for me to have the right to the appeal and to exhaust the appeals of the constitutionality of the SAMP plan basically as it relates to me. I just wanted to clarify that it was – that I would be capable on bail to exhaust those remedies before I would have liability to a [p. 1441] sentence or liability to whatever sentence might have

been imposed. I would have the ability to appeal, to exhaust the appeal rights that I have before that.

THE COURT: I am not sure I really know what you are asking me. Perhaps your attorney can tell me what you mean.

MR. COHAN: I think the question that Mr. Lee is trying to get an answer to is will he be on bail pending appeal until his appellate remedies are exhausted? Assuming that he losses all the way up to the United States Supreme Court, will he be on bail assuming that he timely perfects all the procedures pursuant to?

THE COURT: Well, let me ask, having been here as long as I have, and I see, quote, appellate processes, going on, you know, 10, 12 years, after cases have been, quote, concluded. If by that you mean that after appellate, normal appellate, direct appeal, is what we are talking about, direct appeal through the California courts, to the federal courts or to certiorari to the U.S. Supreme Court, that's what I call a direct appeal in my opinion.

After that's been completed and set aside, I assume unsuccessfully, anticipate coming down to the court to order execution of sentence, thereafter extraordinary writs and things of that nature I would not consider to be within that appellate process. Because otherwise, as you know, there would be no end.

MR. COHAN: No, your Honor. My question and Mr. Lee's was just direct appeal and exactly as your Honor has articulated. In other words, we are not talking about [p. 1442] collateral attack. Although he may avail

himself if we get into that position, we are not conditioning and you are not conditioning this disposition on being at large on bail through 2254 proceedings or whatever. That being petition for writ of habeas. All we are asking you is whether your Honor's agreement, as I understand it, or order, would be bail pending exhaustion of direct appellate remedies. And my understanding was that that was contemplated in disposition.

THE COURT: That's what I believe I contemplated and the district attorney I believe was in agreement with that understanding. Correct?

MS. RILEY: Yes, your Honor, I understand that.

THE DEFENDANT: Are you satisfied?

MR. COHAN: Yes.

THE DEFENDANT: I am satisfied, your Honor. So then one last thing, I think two things. One real short one.

As I understand it, there would be a sentence, then, before appeal?

THE COURT: Yes, you can't appeal before there has been a sentence.

THE DEFENDANT: I understand. Yeah, I hadn't thought of that. But I guess that's asking for too much. The other thing is that I had asked that I be allowed, because it's very, very important to me doing this, that I be allowed to read a statement or to make a statement at the time of pleading, especially to the 217 section of the 1812.217 statute that I am not in any way by

doing this confessing my [p. 1443] intention to willfully, intentionally with intent defraud anyone with this.

I understand that intent is not as it's written now part of that statute as has been represented today in court and yesterday in court. And I think I understand that. I don't want by doing this to be implying that I had intent to defraud anybody with the 1812.217 section, but I may have made a statement that was misleading or that somebody didn't show wasn't exactly factual, but not with any knowledge of the same. I am not pleading to saying that I intentionally did that. And that's very important to me.

THE COURT: Well, I do not really at this moment know whether that is in conflict with what the district attorney believes to be required, so I will leave it up to her.

MS. RILEY: Your Honor, in dismissing the 487 count, I believe we dismissed the counts that carried with them the intent to defraud. The 217 count that the defendant is pleading to, he would be pleading to the language as it is written in the Information and what it specifically says – well, I will read it so there will be no doubt as to what it specifically says at the time of the plea.

THE COURT: Anything else?

MR. COHAN: I think not. I think we can go forward.

Mr. Lee?

MR. COHAN: I am not sure whether Mr. Lee –

THE DEFENDANT: It's been clarified on the record.

MR. COHAN: This is all on the record, Mr. Lee.

THE DEFENDANT: Just let me put one more thing on it.

[p. 1444] Your Honor, my goal with that statement was to – let's say I went to appeal and then appeal was determined that intent should have been part of the 1812.217 to hold me liable and responsible to a prison sentence. That it should have been part of that. I don't want to ever unwittingly plead guilty to something that may have carried with it that intent. So if that's been clarified, then I am satisfied.

THE COURT: Well, the district attorney has made a statement and it is on the record that it is her opinion and that she is accepting your plea with the understanding that your plea or this section has pled in the information does not require that you have the intent to deceive or to misrepresent.

Is that correct?

MS. RILEY: That's correct.

THE COURT: Okay. Now with that statement, it would appear to me that I have two parties in front of me who are in agreement with what you are pleading to and it would be very difficult it would seem to me for any appellate process to not agree with the statements of the two of you.

THE DEFENDANT: I thank you very much.

MS. RILEY: The one thing I am not quite sure may have gotten muddied here in the report. I believe I heard the defendant use the word "willfully." Willfully is,

in fact, part of the statute. It is, in fact, part of what he will be pleading to.

THE COURT: Okay. I am sure that when we use the [p. 1445] word "willfully," we know that that does not require an intent to deceive you. It means an intent to do the specific act or make the statement. Does not require an evil intent.

Do you agree with the position now, Mr. Lee?

THE DEFENDANT: Yes, I understand the term willful and the omission of.

THE COURT: Do you have any other questions?

THE DEFENDANT: I think you have done a great job of explaining it to me.

THE COURT: Listen carefully to the process that we must go through. I think you have been in several courts where we have done it, so the process requires your audible responses. And, again, you have the opportunity should you have a question to take the time to talk to either or both of your attorneys.

District attorney may proceed.

MS. RILEY: Mr. Lee, your attorney has made a motion to withdraw. Do you understand that the Court will ensure that you have competent counsel it you choose to proceed today?

THE DEFENDANT: Yes, I do.

MS. RILEY: Do you understand that if your attorneys have been relieved, the Court would appoint an

attorney for you in the event that it were shown that you were unable to afford an attorney?

THE DEFENDANT: Yes, I do.

MS. RILEY: Is your plea the result of fear that you [p. 1446] will not be competently represented if you should choose to go to trial?

THE DEFENDANT: No, not at all.

MS. RILEY: Have you in any way been coerced or forced by your counsel to enter this plea?

THE DEFENDANT: Not at all.

MS. RILEY: Mr. Lee, is the correct spelling of your name D-e-n-n-i-s, middle initial M., Lee, L-e-e?

THE DEFENDANT: Yes, ma'am.

MS. RILEY: And are you also known as Josiah, J-o-s-i-a-h, David, D-a-v-i-d?

THE DEFENDANT: I guess. I was a long time ago, not now.

MS. RILEY: And is your date of birth May 11, 1946?

THE DEFENDANT: Yes.

MS. RILEY: And you are now withdrawing your previously entered plea of not guilty and entering a plea of guilty to Count 1.

Count 1 of the Information says,

"the district attorney of the County of Ventura by this Information alleges that Dennis M.

Lee committed the crime of violation of section 1812.205 of the Civil Code, a felony, in that on or about October 3rd, 1987, in Ventura County, California, he did willfully and unlawfully fail to provide Robert Coleman the written statement required by Civil Code Section 1812.205 at the first [p. 1447] in-person communication or in the first written response to an inquiry by Robert Coleman concerning a seller-assisted marketing plan, in violation of Civil Code Sections 1812.205 and 1812.217."

Do you plead guilty to that count?

THE DEFENDANT: Yes.

MS. RILEY: Count 2 says,

"Complainant further accuses Dennis M. Lee of committing the crime of violation of section 1812.206 of the Civil Code, a felony, in that on or about October 28, 1987, in the Ventura County, California, he did willfully and unlawfully fail to provide Robert Coleman, a prospective purchaser of a seller-assisted marketing plan, the written disclosure statements required by Civil Code Sections 1812.205 and 1812.206 at least 48 hours prior to the execution of a seller-assisted marketing plan contract or agreement or at least 48 hours prior to the receipt of any consideration from Robert Coleman, in violation of Civil Code Sections 1812.206 and 217."

Do you now plead guilty to that count?

THE DEFENDANT: Yes.

MS. RILEY: Count 3 said,

"Complainant further accuses Dennis M. [p. 1448] Lee of committing a crime of violation of

section 1812.207 and 1812.209 of the Civil Code, a felony, in that on or about October 28, 1987, in Ventura County, California, he did willfully and unlawfully fail to use or provide Robert Coleman with a written contract required by Civil Code Sections 1812.207 and 1812.209, in violation of Civil Code Sections 1812.207 and 1812.209."

Do you now plead guilty to that count?

THE DEFENDANT: Yes.

MS. RILEY: Count 4 says,

"Complainant further accuses Dennis Mr. Lee of committing the crime of violation of section 1812.217 of the Civil Code, a felony, that on or about October 28, 1987, in Ventura County, California, he did willfully engage directly or indirectly in an act practiced or course of conduct which operated as a fraud or deceit upon Robert Coleman in connection with the offer or sale of the seller assisted marketing plan, in violation of Civil Code section 1812.217."

Do you now plead guilty to that count?

THE DEFENDANT: Yes. But no intent.

MS. RILEY: Count 25 says,

"Complainant further accuses Dennis Mr. Lee of committing a crime of violation of [p. 1449] section 1812.205 of the Civil Code, a felony, in that on or about November 3rd, 1987, in Ventura County, California, he did willfully and unlawfully fail to provide George Jamison the written statement required by Civil Code Section 1812.205 at the first in-person communication or in the first written response to an inquiry

by George Jamison concerning a seller-assisted marketing plan, in violation of Civil Code Sections 1812.205 and 1812.217."

Do you now plead guilty to that count?

THE DEFENDANT: Yes.

MS. RILEY: Count 26 says,

"Complainant further accuses Dennis M. Lee of commiting the crime of violation of section 1912.206 of the Civil Code, a felony, in that on or about December 2nd, 1987, in Ventura County, California, he did willfully and unlawfully fail to provide George Jamison, a prospective purchaser of a seller-assisted marketing plan, the written disclosure statement required by Civil Code Section 1812.205 and 1812.206 at least 48 hours prior to the execution of seller-assisted marketing plan contract or agreement or at least 48 hours prior to the receipt of any consideration from George [p. 1450] Jamison, in violation of Civil Code Sections 1812.206 and 1812.217.

Do you now plead guilty to that count?

THE DEFENDANT: Yes.

MS. RILEY: Count 27 says,

"Complainant further accuses Dennis M. Lee of committing the crime of violation of sections 1812.207 and 1812.209 of Civil Code, a felony, in that on or about December 2nd, 1987, in Ventura County, California, he did willfully and unlawfully fail to use or provide George Jamison with a written contract required by Civil Code Sections 1812.207 and 1812.209, in

violation of Civil Code Sections 1812.207 and 1812.209.

Do you now plead guilty to that count?

THE DEFENDANT: Yes.

MS. RILEY: Count 28 says,

"Complainant further accuses Dennis Mr. Lee of committing the crime of violation of section 1812.217 of the Civil Code, a felony, in that on or about November 3rd, 1987, in Ventura County, California, he did willfully engage directly or indirectly in an act, practice or course of conduct which operated as a fraud or deceit upon George Jamison in connection with the offer or sale of a seller-assisted marketing plan, in [p. 1451] violation of Civil Code Section 1812.217."

Do you now plead guilty to that count?

THE DEFENDANT: Yes. With no intent.

MS. RILEY: Mr. Lee, do you understand that the Court is required to find a factual basis for your plea to ensure that you are entering a plea to the proper offenses under the facts of the case?

THE DEFENDANT: Yes.

MS. RILEY: And with regard to your plea to Count 1, 2, 3, 4, 25, 26, 27 and 28, is it your understanding that the remaining counts will be dismissed after you are sentenced?

THE DEFENDANT: Yes.

MS. RILEY: All right.

And do you understand that no additional charges will be filed based upon information garnered during the execution of the search warrant or otherwise having to do with your activities with CFS prior to June of 1988?

MR. COHAN: I believe you need to include UCS of A.

MS. RILEY: And UCS of A.

[p. 1452] THE DEFENDANT: Yes.

MS. RILEY: Has your attorney explained to you the direct and indirect consequences of your plea and admissions, including the maximum possible sentence?

THE DEFENDANT: Yes.

MS. RILEY: Do you understand that under the law you could be sentenced to state prison for a max possible term of six years?

THE DEFENDANT: Under the law, yes.

MS. RILEY: And do you understand that under the law, after you had served that prison term, you could be subject to a maximum parole period of three years?

THE DEFENDANT: Yes.

MS. RILEY: Do you understand that you could be deported, excluded from the United States or denied naturalization if you were not a citizen?

THE DEFENDANT: Yes.

MS. RILEY: Do you understand that you will be ordered to pay a restitution fine of not less than $100 nor more than $10,000 pursuant to government Code section 13967?

THE DEFENDANT: Yes, I do.

MS. RILEY: Do you understand that you may be ordered to pay an additional fine of up to $20,000, plus penalty assessment of up to $13.50 for every $10 in fines imposed under Civil Code section 1812.217?

THE DEFENDANT: Yes, I do.

MS. RILEY: And do you agree that if it is discovered that the Information as charged does not charge all prior [p. 1453] convictions of which you have been convicted and all prison terms which you have served, the Information may be amended at any time before judgment is pronounced to add these priors, additional priors could increase your maximum prison term and could result in my being found ineligible for probation?

MR. COHAN: I am sure you meant Mr. Lee being found ineligible for probation.

MS. RILEY: Yes, I did indeed.

THE DEFENDANT: Yes.

MS. RILEY: And did I explain to you, Mr. Lee, that as of this time, there are no priors alleged in the Information and this means that if we were to discover that there were priors, that we did not know of at the time we filed the information, that those priors could be charged?

Did I explain that to you?

THE DEFENDANT: I'd like to clarify 1975 issue which I believe the Court is aware of.

MR. COHAN: May I address this? Let me address this.

Just so we are clear here, by this agreement, the People are barred from attempting to utilize the conviction of which we are all aware in 1975 based on a guilty plea by Mr. Lee in exchange for probation, and that that cannot be added to the Information or otherwise employed to enhance sentencing.

MS. RILEY: Yes. Nor do the People have any intention of adding such.

THE DEFENDANT: Yes, I do.

MS. RILEY: And do you agree that you would be entitled [p. 1454] to a jury trial on the question of whether or not you had suffered such priors, but the pleas and admissions entered pursuant to this felony disposition statement would remain in effect?

THE DEFENDANT: Yes.

MS. RILEY: And you give up the right – there was no earlier amendment in the Information. Skip that.

Do you understand that you may be ordered to pay restitution to the victim?

THE DEFENDANT: Yes.

MS. RILEY: Victims.

Do you understand that you are entitled to a judicial determination of the amount of restitution and that unless otherwise ordered, the probation and sentencing hearing would constitute the hearing upon the amount of restitution?

THE DEFENDANT: Yes.

MR. COHAN: In other words, all matters, including probation, sentencing and restitution will be added at that single hearing. Correct?

MS. RILEY: That's correct.

THE COURT: Not necessarily true. You will notice it says unless upon further order, and often what happens in cases where restitution is a more complicated issue, that the actual testimony or other evidence necessary to arrive at a fair and just restitution is postponed even later than the sentencing hearing for an additional determination.

So if necessary, it may not be concluded at this hearing. But unless it is ordered to be at another hearing, [p. 1455] it will be at that P and S, or probation and sentencing hearing, which will be at the time she is talking about.

MR. COHAN: Do you understand that?

The question that Mr. Lee has is whether any obligation which may be imposed by way or sentence or restitution will be held in abeyance pending the appeal. My response is yes. I want to make sure that's correct.

THE COURT: That doesn't necessarily – isn't necessarily true. And it has not been addressed by us and it is something that should be discussed.

Normally, with respect to probation, a grant of probation, bail on appeal for a grant of probation normally only stays that portion of probation which is the jail sentence and the other terms and conditions of probation are still in effect.

If it is not a sentence to state prison without probation, then a bail on appeal stays all of it, all matters that would relate to the sentencing. The court has the power even under the former situation of a granting of probation to stay all of the terms and conditions of probation pending an appeal. That hasn't been addressed, and I suppose that it should be something that at least at this time we make an agreement upon.

MR. COHAN: We must.

THE COURT: What's the People's position regarding that matter?

MS. RILEY: I believe that at the time we were discussing this, I was of the mind set that it would all be [p. 1456] stayed, and so I believe at the time I entered – we entered into these discussions that is what I believed would happen. So as a result, unless there is something that the Court feels strongly about, I would agree that it would all be stayed pending appeal. And my thinking in that is that that restitution would only –

THE COURT: Well, I have no problem with restitution. My mind is running to other conditions of probation other than restitution.

Specific question that counsel asked was the question concerning the terms and conditions which would relate to restitution. And I suppose that normally I review those kinds of matters on a stay pending appeal such as jail and fines or restitution. There are other terms and conditions which are not general that are on all terms of probation that normally I don't stay because I am of the opinion that those are the kinds of things that we should all obey

anyway, like obey all laws and don't disagree with your mother and things like that.

I guess I am concerned in this case because the only grounds on appeal that appears to me to be actively sought in this case is the unconstitutionality of the law that relates to this whole thing. And I suppose that if in fact it's successful, then it would appear that perhaps no punitive matters of any kind, including the general ones, would be a good boy should apply. So I guess I am indicating that under the circumstances of this case, the pending appeal that I would be willing to suspend and delay the terms and conditions [p. 1457] of probation entirely pending appeal.

Do you have any thought on that?

MS. RILEY: Well, unfortunately I did not discuss this with anyone else, but my feeling about that is that the constitutional basis of the appeal is such that if the Court were to determine that this code were unconstitutional, although I don't initially believe that were to happen, but if that were to happen, then none of the – none of the counts that the defendant has pled to would be in effect. And so for that reason, I would agree with the Court's analysis.

THE COURT: Okay, Then I think the record will be clear that in addition to the bail on appeal which would stay a jail sentence, if probation is contemplated by the Court will also stay other terms and conditions of probation with the probable exception of and that is of a reporting nature. I believe that that would be a requirement that would be on any grant of probation, and that's a reporting that can be limited to a written report to the

probation officer for a determination of location and things of this nature.

I believe there should be some – well, let's think about it. Defendant is on OR plus a bail.

MR. COHAN: My understanding was that the current status would simply continue pending the appeal.

THE COURT: If the current status stays pending the appeal with respect to the OR but even that I would consider modifying it in any event. More lenient than it is.

MR. COHAN: We certainly wouldn't want to impede that, your Honor.

[p. 1458] THE COURT: Presently I have the defendant under an OR that I think is restrictive to the extent that if this case is going to process of appeal need not be that restrictive.

MS. RILEY: You are referring to the physical movement portions of it?

THE COURT: Yes.

MS. RILEY: Yes, I would agree with that. However, if, in fact, that is made easier for him to move around, I think it becomes even more important that the reporting part of probation be in effect, because it will be quite important that we continue to know the location of the defendant. And I agree with you that that reporting can be in the form of writing on a regular basis.

THE COURT: Well, the usual reporting is a monthly written report.

MR. COHAN: We don't object to the defendant reporting as to his whereabouts on a monthly basis. No problem at all.

THE COURT: There is another term and condition and term of probation, that's in all cases, and by law must be there and that's obey all laws. That's a requirement.

THE DEFENDANT: I want to do that.

THE COURT: So that will be in effect and can't be stayed.

MR. COHAN: We didn't think that there was any exceptions from operation of laws generally based on this appeal. Although it's an appealing prospect.

THE COURT: There is another one that would be in effect as a matter of law and you gentlemen told me it is a [p. 1459] law that the federal system, anyway, and that's relating to possession of firearms.

MR. COHAN: Mr. Lee does not possess a firearm and has no intention of acquiring one.

THE COURT: Okay. I cannot think of any other term and condition of probation that at this time would not be stayed pending the outcome of the appeal.

THE DEFENDANT: Sounds fine.

THE COURT: Now, there are others that come to my mind. I feel that reasonable minds will be able to come to an agreement on at the time of sentencing. If not, we may be back here. But I cannot imagine that we cannot agree. I can't think of any at the moment. And I do

not believe that it would be type of thing that the Court would be unreasonable concerning them. And I think it would be the type of thing that the People would agree with, but I can't think of them. So go ahead with your questions.

MS. RILEY: Mr. Lee, has your attorney explained to you and do you understand that this plea will result in your conviction and that you are therefore giving up, waiving each of the following constitutional rights: You are giving up the right to have every charge and allegation against you determined by a jury of 12 persons.

THE DEFENDANT: Yes.

MS. RILEY: you are giving up the right to confront and through your attorney cross-examine each witness called by the prosecution to prove your guilt.

THE DEFENDANT: Yes.

[p. 1460] MS. RILEY: You are giving up the right against self-incrimination, which means that you would not have to testify at your trial; and if you did not, the judge or the jury could not consider this as evidence of your guilt.

Do you understand that?

MS. RILEY: Yes.

THE DEFENDANT: And do you agree that all facts and information relating to any and all counts, allegation of prior convictions, and other sentencing enhancements allegations which are dismissed by the Court as part of this disposition, may be included in the

probation report and considered by the Court in determining the sentence what we have referred to as a Harvey waiver?

THE DEFENDANT: Yes.

MS. RILEY: Mr. Lee, are you entering this plea and giving these admissions freely and voluntarily and not as a result of any force, pressure, threats or coercion brought against you or any member of your family?

THE DEFENDANT: Yes.

MS. RILEY: And do you agree that no commitments have been made to you or your attorney other than those appearing on this form and in this record?

THE DEFENDANT: Yes.

MS. RILEY: All right.

Mr. Lee, throughout this felony disposition statement, which I am holding in my hand, your initials appear on pages 2 –

THE DEFENDANT: Yes.

[p. 1461] MS. RILEY: Pages 3 –

THE DEFENDANT: Yes.

MS. RILEY: Page 4 –

THE DEFENDANT: Yes.

MS. RILEY: And Page 5.

THE DEFENDANT: Yes.

MS. RILEY: Did you place your initials on this page?

THE DEFENDANT: Yes.

MS. RILEY: And did you place your initials there freely and voluntarily and after discussing what it was you were initialing with your attorney?

THE DEFENDANT: Yes.

MS. RILEY: And on Page 6 of this felony disposition statement appears today's date May 31, 1990, and the signature of Dennis Lee. Did you place your signature there?

THE DEFENDANT: Yes.

MS. RILEY: And did you place your signature there after you had discussed the facts of the case and all possible defenses which you might have with your attorney?

THE DEFENDANT: Yes.

MS. RILEY: And have you read and do you understand this form that you have initialed and signed?

THE DEFENDANT: Yes.

MS. RILEY: And have you discussed with your attorneys and do you understand the consequences of this plea and your constitutional rights?

THE DEFENDANT: One second.

I said I had read it, and I haven't actually read [p.1462] this sentence. I should read it.

MS. RILEY: All right.

MR. COHAN: The defendant has asked me as his counsel which constitutional rights he is giving up,

and I want to indicate to him they are the three that Mrs. Riley just read into the record on Page 4.

THE DEFENDANT: Okay.

MR. COHAN: So those are the only constitutional rights which the defendant is giving up at this time based on this plea. And he is not giving up any of his appellate remedies other than the waiver of the three rights specifically enumerated under heading F on page 4.

Is that correct.

THE DEFENDANT: Oh, yeah. Thank you. I just would have been lying if I'd said I'd read that because I hadn't read it.

MR. COHAN: There was one other matter that needs to be read into the record before we complete this and that is the form to which you referred Mr. Lee also includes on it some handwritten notations under heading A on Page 7, "Court's position on sentence," and those handwritten notes which were represented to you as having been written by the Court in this case are that the sentence is mid term on all counts to which the defendant plead guilty, maximum of four years CDC, which is explaining to you meaning Department of Corrections, and, parentheses, double base term, end parentheses, and bail to be granted on appeal, no greater than presently set.

Is that all part of the plea agreement as you

* * *

[p. 1486] violations, the nature of the extent of wrong, if there be such, and the effect that this whole wrong has had and the amount of punishment, if any, that is needed.

I think the first thing that must be clear to everyone, and that is that the defendant stands before the Court convicted by his plea of certain violations, and it's those violations for which the Court is to impose sentence. The violations are those of the Seller-Assisted Marketing Plan Act, which has as its purpose the regulation of businesses and persons who enter into commercial activities in this state whereby they are apt to be the type of people who will be involved with unsophisticated, uneducated and unwary victims believing that there is a pie in the sky type of means of making a lot of money and taking care of their retirement and making life easy for themselves, to protect people from being taken for their retirements, their monies that they've set aside for the later part of their lives and things of that nature.

And, of course, by the definition of "seller-assisted," it's meant to cover those type of transactions where the seller maintains a relationship with these people and thereby continues to bleed them, theoretically, erroneously and wrongfully for their monies over these periods of time.

It is to prevent this that the legislature has said that these type of people that want to be in what would be a legitimate seller-assisted marketing plan

* * *

[p. 2155] MS. DEAN: Objection to the question and motion to strike as beyond the scope of cross.

THE COURT: The objection is sustained.

MR. HANAWALT: That probably is true. There's a couple questions I missed on direct. I thought they had been touched upon by counsel. I stand corrected.

THE COURT: Finish redirect and then I'll allow you to reopen if you want.

MR. HANAWALT: Essentially that – your Honor, I have no further cross examination. I'll be brief as I can.

THE COURT: You mean redirect? You may reopen direct for this one purpose.

BY MR. HANAWALT:

Q What was the arrangement regarding the ten days within the membership to have their refund?

A Whenever a kit was sold, be it manufacturing, marketing or installation, the person who purchased the kit had ten days from the date they received the kit to send it back to us. And if they did not send it back to us, then they bought it.

Q What was the basis for making a kit sale? What did it take for the – what was a sale?

A A sale is when somebody either through a credit card or check or money order or cash gave us the amount required to purchase the kit. And then they could either ship it to them or sometimes they picked it up on the premises.

Q What percentage were credit card purchases?

A Hard to say. In my head I'm not exactly sure. It [p. 2156] was significant. I would say at least $100,000 business was done by credit card up to the time of the raid.

Q Did you ever give a contract to anyone?

A A contract regarding what?

Q Anything.

A The only – well, the only – anybody who bought a kit, all they got was an invoice for the materials.

Q Why was it that you did not have a contract arrangement for the kit?

A Because –

MS. DEAN: Objection. Calling for speculation, lack of foundation.

MR. HANAWALT: Well, as the controller I would think he would know.

THE COURT: Answer the question. Overruled.

THE WITNESS: Could you repeat it?

Q BY MR. HANAWALT: Why was there no contract for the purchase of a kit?

A Because all they were buying was the kit, and the invoice is general business procedure. They get an invoice of what they bought.

Q Had there been any orders for, before the raid in January, for the direct-drive cooling kits or bubbles or hotboxes?

A Up until when?

Q January, the date of the raid.

A No.

Q How may members ever assembled t the units and

* * *

Supreme Court, U.S.
FILED
OCT 20 1992
OFFICE OF THE CLERK

NO. 91-2044

IN THE

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

DENNIS MERLE LEE,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT, DIVISION SIX

BRIEF OF RESPONDENT IN OPPOSITION

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON, Chief
Assistant Attorney General
CAROL WENDELIN POLLACK, Senior
Assistant Attorney General
ROBERT CARL SCHNEIDER,
Deputy Attorney General
ALISON BRAUN,
Deputy Attorney General
300 South Spring Street, 5th Floor
Los Angeles, California, 90013
Telephone: (213) 897-2276
ATTORNEYS FOR RESPONDENT
[Counsel of Record]

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Does California's strict criminal liability law - the Seller Assisted Marketing Plan Act ("SAMP Act") - violate due process by failing to provide fair warning that it applies to single-shot business sales with no continuing legal obligation between the seller and the purchaser?

2. Did the California Court of Appeal violate constitutional due process by compromising the terms of petitioner's plea bargain which expressly preserved a right on appeal to challenge the constitutionality of the SAMP Act as applied to his conduct?

TABLE OF CONTENTS:

		Pages
JUDGMENT BELOW		1
JURISDICTION		2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED		2
STATEMENT OF THE CASE		3
	Introductory Statement	3
ARGUMENT		
I	THE PETITION SHOULD BE DENIED BECAUSE PETITIONER PLED GUILTY AND HE CANNOT CHALLENGE THE STATUTE AS UNCONSTITUTIONAL AS APPLIED TO HIM	7
II	THE SAMP STATUTE IS NOT UNCONSTITUTIONALLY VAGUE AND IT DOES PROVIDE FAIR NOTICE	17
III	PETITIONER'S CLAIM THAT THE SAMP STATUTE DOES NOT PROVIDE FAIR NOTICE BECAUSE THERE IS NO ADVISORY OPINION MECHANISM SHOULD BE DISMISSED	23
IV	THE DECISION BELOW CONFLICTS WITH NO OPINION OF THIS COURT, A FEDERAL COURT OF APPEALS, OR A STATE SUPREME COURT	25
CONCLUSION		26

TABLE OF AUTHORITIES

Pages

Cases

Boyce Motor Lines v. United States,
342 U.S. 337 (1952) 17, 18

Dukes v. Warden,
406 U.S. 250 (1971) 14

General Pictures Co. v. Electric Co.,
304 U.S. 175 (1937) 10

Graver Mfg. Co. v. Linde Co.,
336 U.S. 271 (1948) 15

Grayned v. City of Rockford,
408-U.S. 104 (1972) 18

McCarthy v. United States,
394 U.S. 459 (1969) 8, 13

North Carolina v. Alford,
400 U.S. 25 (1970) 12

Ross v. Moffitt,
417 U.S. 600 (1973) 15

Southern Power Co. v. Pub. Serv. Co.,
263 U.S. 508 (1923) 24

United States v. Broce,
488 U.S. 563 (1988) 8

United States v. Doe,
465 U.S. 605 (1984) 15

United States v. Johnston,
268 U.S. 220 (1924) 9

United States v. Mendenhall,
446 U.S. 544 (1979) 24

United States v. Mims,
928 F.2d 310 (9th Cir. 1991) 14

Yonakim v. Miller,
425 U.S. 231 (1976) 24

Constitutional Provisions

Fourteenth Amendment 7

Statutes

Cal. Civ. Code, § 1812.200, subd. (a) 21

Cal. Civ. Code, § 1812.200, subd. (b) 21

Cal. Civ. Code, §§ 1812.201-1812.220 20

Court Rules

Cal. Rules of Court, rule 977 25

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DENNIS MERLE LEE, Petitioner

v.

STATE OF CALIFORNIA, Respondent

BRIEF OF RESPONDENT IN OPPOSITION
TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SIX

BRIEF OF RESPONDENT IN OPPOSITION

JUDGMENT BELOW

Petitioner, Dennis Merle Lee, seeks review of the unpublished judgment and opinion of the Court of Appeal of the State of California filed on November 27, 1991, which was summarily denied by the California Supreme Court on February 20, 1992. A copy of this opinion is set forth in pages 1-17 of the Appendix of petitioner's Petition for Writ of Certiorari. A copy of the denial of petitioner's Petition for Review by the

California Supreme Court is included on page 18 of the Appendix of that document.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. 1257(3). Respondent submits that petitioner is without jurisdiction because it involves no conflict of decisions and the question raised is not important because the decision below rests on its own facts and the decision below was a correct one.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies upon the Fourteenth Amendment to the United States Constitution.

> "[N]or shall any state deprive any person of life, liberty, or property without due process of law. . . ."

California Civil Code sections 1812.200 et seq. which is reprinted in the Appendix of petitioner's Petition for Writ of Certiorari at pp. 20-52.

STATEMENT OF THE CASE

Introductory Statement

Petitioner began to advertise a $5,000 business opportunity involving instructional videotapes, business advice, the opportunity to purchase equipment parts at discount prices and the rights to market energy systems.

The Seller Assisted Marketing Plan Act is a consumer protection statute regulating the sale of seller assisted marketing plans (hereinafter referred to as "SAMP"). SAMP sellers often represent to prospective purchasers that the seller will set the purchaser up in business, that only a few hours a week are needed, that no experience is necessary, that the

purchase price is secured against loss, and that the purchaser will make a profit over the amount he must invest. Civ. Code, §§ 1812.200-1812.220.

The SAMP Act is basically a disclosure act. It requires the seller to disclose certain information to prospective purchasers in writing prior to the time a contract is signed. Further, this information must also be filed with the Attorney General's Office prior to the time the seller places an advertisement or otherwise solicits purchasers. Some of the disclosures must be incorporated within a mandatory, written SAMP contract. The disclosures are primarily aimed at giving prospective purchasers full information about the SAMP program, the SAMP seller, and the prospective purchaser's chance for success. *Ibid.*

The Act gives purchasers an

unconditional right to cancel the SAMP contract within three business days after its execution, and this right must be explained in the SAMP contract. *Ibid.*

A list of six proscribed selling practices are set forth and the percentage of the initial contract price which can be collected by the seller prior to delivery to the purchaser is established. *Ibid.*

A bond or trust account is required of sellers who represent that the purchaser's investment is secured. If representations are made by the seller regarding the income or earning potential, the Act provides that the seller must have specified data to substantiate these claims and provide these data to prospective purchasers at the time the representation is made. *Ibid.*

The Act further provides that if the seller uses untrue or misleading

statements in selling the SAMP or fails to disclose the required information or uses a contract which does not comply with the Act, then the purchaser can, within one year of purchase, upon written notice to the seller, void the contract. The provisions of the Act cannot be varied. Civil remedies are provided for purchasers injured by a violation of the Act or by a seller's breach of a contract subject to the Act. Misdemeanor or felony criminal penalties can attach to one who willfully violates any provision of the Act, who uses any scheme to deceive in the sale of a SAMP, or who practices fraud or deceit upon any person in the sale of a SAMP. *Ibid.*

/ / /

/ / /

/ / /

/ / /

ARGUMENT

I

THE PETITION SHOULD BE DENIED BECAUSE PETITIONER PLED GUILTY AND HE CANNOT CHALLENGE THE STATUTE AS UNCONSTITUTIONAL AS APPLIED TO HIM

In the caption to his Argument I, petitioner argues that the California Court of Appeal's decision that the SAMP statute was constitutional as applied to him violates the due process clause of the Fourteenth Amendment. However, this characterization of their decision is not accurate. The California Court of Appeal did not find the statute constitutional as applied to petitioner. It found that because petitioner had pled guilty, he could not then raise on appeal such factual issues. The basis for their ruling was founded on solid, well-established legal principles. By pleading guilty, petitioner has admitted that he

committed at least the minimal acts necessary to constitute the acts prohibited by the SAMP statute. *United States v. Broce*, 488 U.S. 563, 570 (1988); *McCarthy v. United States*, 394 U.S. 459, 466 (1969). Petitioner cannot now, raise issues in regard to his conduct, even in the guise of the argument that the statute as applied to him was unconstitutional, because to do so is an invitation to the appellate court to make factual findings. As the California Court of Appeal states, appellant could not characterize a factual issue as a legal one because "determining the question as a legal issue does not transform it into a reviewable matter since its determination would necessarily require an evaluation of the evidence." Petn. for Cert., App. p. 6. Furthermore, because petitioner pled guilty, the only record is that petitioner admitted

committing acts which are prohibited by the statute. Thus, to ask this Court to determine whether the statute was unconstitutional as applied to petitioner is to ask this Court to determine what those acts were. No appellate court has that power, not even this Honorable Court because appellant admitted what those acts were and because this Court will not grant certiorari to review evidence and discuss specific facts.[1/] *United States v.*

---

1. Consequently, any of the factual issues which petitioner has attempted to cast in constitutional terms are not cognizable by this Honorable Court. These include: that petitioner's sales had no additional payments; whether petitioner's buyers had their money obligations "grow or come to be"; whether or not the trial court stated petitioner's were single-shot sales (the trial court heard argument on constitutional issues regarding the statute but never ruled because petitioner pled guilty when he lost his motion to dismiss for vindictive prosecution); whether or not a law enforcement official told appellant his sales were legal; whether petitioner

Johnston, 268 U.S. 220, 227 (1924); see also *General Pictures Co. v. Electric Co.*, 304 U.S. 175, 178 (1937).

Petitioner has mischaracterized the record when he states that the California Court of Appeal violated constitutional due process by compromising the terms of his plea bargain. The California Court of Appeal found that his plea bargaining agreement merely provided that petitioner did not waive his right to appeal. Petn. App., p. 7. Petitioner now claims the state appellate court failed to honor the terms of his plea bargain by declining "to consider the fair warning component of petitioner's constitutional attack on the SAMP Act based on its ambiguity as applied to single-shot sales." Petn. p. 13. As argued above, petitioner is barred from

---

believed wilfully meant a bad motive.

litigating the issue of whether his sales were "single-shot" and whether the statute was ambiguous as to his conduct. As pointed out by the Court of Appeal, there was no agreement that petitioner could raise non-cognizable issues on appeal after his guilty plea. Petn. App., p. 7.

Petitioner appears to base his claim that the California Court of Appeal compromised his guilty plea upon a phrase taken out of context. After the court explained that petitioner would have to pay restitution only on the charges set forth in the Information, petitioner then asked about bail, stating, ". . . a key issue is for me to have the right to the appeal and to exhaust the appeals of the constitutionality of the SAMP plan basically as it relates to me. I just wanted to clarify that it was -- that I would be capable on bail to exhaust those

remedies before I would have liability. . . ." Petn. App., pp. 59-60.

Petitioner's concern here was that he could have bail on appeal and that he was not using any particular term of art relative to specific constitutional claims. Later, petitioner makes it clear that the only thing he is not admitting by pleading guilty is that he had no intent to defraud and he made that statement at the taking of the plea. See *North Carolina v. Alford*, 400 U.S. 25, 37 (1970); a guilty plea is valid even where a defendant is unwilling to admit participation in the acts contituting the crime. Petn. App., pp. 63-64. The court stated that the parties were agreed about what petitioner was pleading to. Petn. App., p. 64. Petitioner told the court that it had done "a great job of explaining it to me." Petn. App., p. 65.

After petitioner pled guilty to the counts as read in the Information, petitioner answered that he understood that the court must find a factual basis for his plea to ensure that he was entering a plea to the proper offenses under the facts of the case. Petn. App. p. 70. See *McCarthy v. United States, supra,* at pp. 466-467. Later, the court stated, ". . . the only grounds on appeal that appears to me to be actively sought in this case is the unconstitutionality of the law that relates to this whole thing." Petn App., p. 76. The judge did not say, the unconstitutionality as applied to petitioner. If this did not represent the terms of petitioner's plea, there was no objection. Again, on the next page, the district attorney said, ". . . the constitutional basis of the appeal is such that if the court were to determine that

this Code were unconstitutional. . . ." Petn. App., p. 76. There was no "as applied" reference and no objection. See *Dukes v. Warden*, 406 U.S. 250, 256-257 (1971) and *United States v. Mims*, 928 F.2d 310 (9th Cir. 1991); failure to object at sentencing evidences entered into knowingly and voluntarily. Finally, appellant stated he was entering his plea and making these admissions freely and voluntarily and that no other commitments had been made to him or his attorney other than what was in the record on the plea form. Petn. App., p. 80. Thus, the record and appellate court opinion demonstrate that there was no compromise of the terms of petitioner's plea by the California Court of Appeal. Moreover, this argument clearly concerns a factual dispute only and does not involve an issue of federal constitutional dimensions. The

United States Supreme Court is a court of law rather than a court for correction of errors in fact finding in the absence of an obvious and exceptional showing of error. *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1948); see also *United States v. Doe*, 465 U.S. 605, 614 (1984). Certiorari is a discretionary review and depends on many other factors than the perceived correctness of the judgment. *Ross v. Moffitt*, 417 U.S. 600, 617 (1973).

The issue of whether the statute is so vague and over broad so as to encompass retail sales and is therefore unconstitutional on its face was addressed by the California court. When the Court of Appeal stated that by pleading guilty, petitioner has waived any right to have the facts of this case examined on appeal, it pointed out, "We do not thereby mean to imply that a defendant may never challenge

a statute on constitutional vagueness grounds following a guilty plea. Such challenge possibly could be reviewed on its merits where the language of a statute is so patently ambiguous that it is rendered void for vagueness regardless of the nature of defendant's particular acts. That is not the case here. The statutory language is sufficiently specific to exclude transactions involving retail sales." Thus, contrary to petitioner's contention, the constitutional issues were addressed by the Court of Appeal.

In summary, because petitioner admitted that his conduct fell within the purview of the SAMP Act, the only avenue left open to him is whether the statute is so vague that on its face, its infirmity can be established regardless of at whose insistence it is alleged, and petitioner's conduct is irrelevant.

II

THE SAMP STATUTE IS NOT UNCONSTITUTIONALLY VAGUE AND IT DOES PROVIDE FAIR NOTICE

The SAMP statute is not unconstitutionally vague because it clearly sets forth what criminal conduct is prohibited.

The United States Supreme Court has held that no more than a reasonable degree of certainty can be demanded from criminal statutes. *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952).

> "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in depending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with

> untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded." *Ibid.* "The notice provided must be such that prosecution does not `trap the innocent' without `fair warning.'" *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

A SAMP is any sale or offer to sell any product, equipment, supplies or services for an initial payment of between $500 and $5,000 which will aid the purchaser in beginning, maintaining or operating a business when the seller has advertised or otherwise solicited and done one of the three following things:

(1) represented that the buyer will earn more than his initial investment;

(2) represented that there is a market;

(3) represented that he is likely to buy back any product (in whole or in part) marketed by the SAMP buyer and the seller has (a) sold or represents that he has sold at least five SAMPs within the 24 months prior to the solicitation, or (b) intends or represents that he intends to sell at least five SAMPs in the 12 months following the solicitation. See Petn. App., pp. 20-52 for a reprint of the statute.

In other words, the conduct engaged in qualifies as a SAMP even if the prospective SAMP sellers only makes an offer to sell a product etc. which will aid another in starting or operating a business and he also makes the

representations set forth in section 1812.201. If the conduct of the prospective SAMP seller fits section 1812.201, then he must have registered with the Attorney General and complied with the disclosure and other requirements of the remaining sections of Title 2.7 of the Civil Code. §§ 1812.201-1812.220. There is absolutely no need of an executory contract at all, let alone one which obligates the SAMP seller to sell the SAMP buyers services or supplies in the future.

The impetus of the statute is not that the SAMP seller is offering to sell services to the SAMP buyer (although that is quite often the case), but that he is offering a marketing plan -- something that will assist the buyer in establishing or operating a business. The statute was created as a result of the Legislature's

concern about inexperienced purchasers who make initial payments for overpriced products or equipment purporting to aid them in establishing a business that will easily make them self-sufficient. The seller typically does not provide complete information to make the SAMP workable coupled with inaccurate information in regard to the amount of money they can reasonably expect to earn with inaccurate claims about the previous success of the SAMP offered. Cal. Civ. Code, § 1812.200, subd. (a). The Legislature clearly stated, "It is the intent of this title to provide each prospective seller assisted marketing plan purchaser with the information necessary to make an intelligent decision regarding seller assisted marketing plans being offered." Cal. Civ. Code, § 1812.200, subd. (b). Thus, the statute clearly states that no

obligation is necessary -- all the prospective SAMP seller need do is make the offer because the goal is to prevent misleading representations in SAMP sales and to prevent unfair contract terms. The fact that many types of retail sales, even "single-shot" sales, would be swept into the regulatory framework is precisely the point of the statute. The purpose of the statute is the valid and necessary protection of the public.

As can be seen, despite the fact that the statute may apply to a one-time sale of a product which purports to aid the buyer in beginning, maintaining or operating a business and may also apply to a sale of such a product in which the contract contemplates future support in terms of equipment, services, supplies, etc., and despite the fact that the statute may affect a wide range of

industries, trades or professions, the conduct proscribed is defined with precision. It is as easy as "checking the boxes"; no guesswork is involved. If the above conditions are met, the transaction qualifies under the statute. The relative simplicity or complexity of the contract or obligation involved is not determinative.

Since petitioner has failed to show and indeed cannot show that the statute is unconstitutionally vague so that he was not provided with fair notice, the petition for writ of certiorari should be denied.

III

PETITIONER'S CLAIM THAT THE SAMP STATUTE DOES NOT PROVIDE FAIR NOTICE BECAUSE THERE IS NO ADVISORY OPINION MECHANISM SHOULD BE DISMISSED

Petitioner claims that the SAMP statute does not provide fair notice

because there is no "advisory opinion mechanism." However, petitioner does not explain at all what he means by this. Since petitioner has failed to meet his burden for clear, definite and complete disclosures concerning the controversy, the claim should be dismissed. *Southern Power Co. v. Pub. Serv. Co.*, 263 U.S. 508, 509 (1923).

Furthermore, it does not appear that this claim was raised below. (Please refer to Petn. App., pp. 1-17; App. pp. 1-2, the cover sheet and table of contents to petitioner's Petition for Review in the California Supreme Court. The United States Supreme Court will not generally consider matters neither raised nor decided by the court below. *United States v. Mendenhall*, 446 U.S. 544, 551-552, n. 5 (1979); *Yonakim v. Miller*, 425 U.S. 231, 234 (1976).

IV

THE DECISION BELOW CONFLICTS WITH NO OPINION OF THIS COURT, A FEDERAL COURT OF APPEALS, OR A STATE SUPREME COURT

Under the guidelines of this Court's rule 17, a most important consideration in the decision whether to grant certiorari is the existence of a conflict with the decisions of this Court, or conflicting interpretations of a federal question by a state court of last resort and another such state court or federal Court of Appeals. This case presents no such conflict, nor does petitioner claim such a conflict. Moreover, the unpublished opinion below, rendered by a California appellate court, binds no other appellate court and is not even citeable as authority within the State of California.

See Cal. Rules of Court rule 977.[2/]

CONCLUSION

For the foregoing reasons, respondent respectfully requests the Petition for Writ of Certiorari be denied.

Dated: October 19 1992

Respectfully Submitted,

DANIEL E. LUNGREN, Attorney General
Attorney General
GEORGE WILLIAMSON, Chief Assistant
Attorney General
CAROL WENDELIN POLLACK, Senior
Assistant Attorney General
ROBERT CARL SCHNEIDER,
Deputy Attorney General

Alison Braun

ALISON BRAUN
Deputy Attorney General

ATTORNEYS FOR RESPONDENT
[Counsel of Record]

---

2. California Rules of Court rule 977 provides in relevant part, "An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b)."

No. 91-2044

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

DENNIS MERLE LEE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

APPENDIX TO BRIEF OF RESPONDENT IN OPPOSITION TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT, DIVISION SIX

TABLE OF CONTENTS

	Pages
Cover Sheet of Petitioner's Petition for Review in the California Supreme Court	App. 1
Table of Contents from Petitioner's Petition for Review in the California Supreme Court	App. 2

APPENDIX A

APP. 1

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NO._____

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff/Respondent,

v.

DENNIS MERLE LEE,

Defendant/Appellant.

APPELLANT'S PETITION FOR REVIEW

COURT OF APPEAL OF THE SECOND APPELLATE DISTRICT
DIVISION SIX NO. 2 CRIMINAL B052314

(Appeal From the Superior Court of Ventura County
Honorable Robert J. Soares, Presiding
Ventura No: CR-24072)

WILLIAM A. COHAN
COHAN & GREENE
1410 Santa Fe Drive
Encinitas, California 92024
Tel: (619) 436-0044

Attorney for Defendant/Appellant
DENNIS M. LEE

APPENDIX B

APP. 2

TABLE OF CONTENTS

	PAGE:
TABLE OF AUTHORITIES	(ii)
STATEMENT OF THE CASE	1
STATEMENT OF THE UNDISPUTED FACTS	3
ARGUMENT	4
I. THE APPELLATE COURT INCORRECTLY HELD HAT APPELLANT WAIVED HIS RIGHT TO REVIEW	4
a. The Record Establishes the Parties and the Trial Court Agreed that Lee Preserved his Right to Appeal the Trial Court's Rulings on Questions of Law	8
b. The Appeals Court Erred in Holding that the Guilty Pleas Constituted a Waiver of the Right to Review on the Merits of All Legal Issues Raised	11
c. The Appellate Court Erred in Holding that by Pleading Guilty Lee Waived the Right to Challenge the SAMP Act for Vagueness	15
II. THE APPEALS COURT ERRED IN REFUSING TO ADDRESS THE VAGUENESS OF THE ACT AND THE RULE OF LENITY	23
CONCLUSION	28
CERTIFICATES OF SERVICE and FILING	30

NO. 91-2044

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DENNIS M. LEE, Petitioner,

v.

STATE OF CALIFORNIA, Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

I, F. MITCHELL, declare as follows:

I am over 18 years of age, and not a party to the within cause; my business address is 300 S. Spring Street, 5th Floor, Los Angeles, California 90013;

I served a copy of the **BRIEF OF RESPONDENT IN OPPOSITION** in the above entitled case on each of the following persons:

(Please attached list)

by placing same in an envelope(s) addressed to the post office address of each said person(s), and by sealing and then depositing each said envelope, on OCT 20 1992, in the United States mail at Los Angeles, California, with first-class postage thereon fully prepaid;

I thereby have served all parties required to be served;

I declare under penalty of perjury that the foregoing is true and correct.

Executed on OCT 20 1992, at Los Angeles, California.

Declarant

F. MITCHELL

LA92US0004

SERVICE LIST

Bruce Elliot Fein, Esq. (3 Copies)
562 Innsbruck Avenue
Great Falls, VA 22066

California Court of Appeal
Second Appellate District
Division Six
1280 S. Victoria Ave., #201
Ventura, California 93003

Rebecca Riley
Deputy District Attorney
800 South Victoria Avenue
Ventura, California 93009

Hon. Sheila Gonzalez, Clerk
800 South Victoria Avenue
Ventura, California 93009

Supreme Court, U.S.
FILED
OCT 30 1992
OFFICE OF THE CLERK

(3)

No. 91-2044

In The

Supreme Court of the United States

October Term, 1992

DENNIS MERLE LEE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division Six

REPLY TO BRIEF IN OPPOSITION

October 30, 1992

BRUCE ELLIOTT FEIN
Attorney at Law
562 Innsbruck Avenue
Great Falls, VA 22066
(703) 759-5011

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

ARGUMENT 1

CONCLUSION 3

TABLE OF AUTHORITIES

Santobello v. New York, 404 U.S. 257 (1971)..... 3

United States v. Briggs, 939 F.2d 222 (5th Cir. 1991) 2

United States v. Pearson, 910 F.2d 221 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 977 (1991) 2

United States v. Salmon, 944 F.2d 1106 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1213 (1992) 2

ARGUMENT

Respondent misstates both facts and law pertinent to this Court's consideration of petitioner's request for certiorari.

1. Respondent incorrectly asserts (Resp. Br. at 9 n.1) that the trial judge declined to consider the constitutionality of the Seller Assisted Marketing Plan Act ("SAMP Act") as applied to petitioner. As noted in the Appendix to the Petition for Writ of Certiorari at 19 ("App."), the trial judge ruled on September 26, 1989 that the SAMP Act "as applied to this case is constitutional." The California Court of Appeal would need to make no additional factual findings to review that constitutional ruling of the trial court.

2. Respondent wrongly argues (Resp. Br. at 13-14) that petitioner waived his right to challenge the constitutionality of the SAMP Act as applied to him because there was no explicit "as applied" reference in the plea bargain interchanges between the trial judge, petitioner, district attorney, and defense attorney. But the plea bargain came on the heels of the trial judge's rejection of a constitutional attack on the SAMP Act as applied to petitioner. *See* App. 19. Thus, the trial court contemplated an appeal challenging that "as applied" ruling in stating, ". . . the only grounds on appeal that appears to be actively sought in this case is the unconstitutionality of the law that relates to this whole thing." App. 76. The reference to "this whole thing" is most reasonably interpreted to mean petitioner's entire case, not a facial attack on the constitutionality of the SAMP Act, an issue the trial judge never addressed.

As respondent notes (Resp. Br. at 13-14), the district attorney referred to an appellate constitutional attack "on this code," a reference that suggests the possibility of a facial challenge to the SAMP Act. But the district attorney never communicated to petitioner any understanding that his guilty plea would waive his right to seek review of the trial judge's ruling upholding the constitutionality of the SAMP Act "as applied to this case." Indeed, she expressly informed petitioner through interrogation that his guilty plea waived only three constitutional rights: the right to a jury trial; the right to confront and cross-examine witnesses; and, the right against self-incrimination. App. 79. Petitioner's counsel then clarified without provoking any dissent: "So those are the only constitutional rights which the defendant is giving up at this time based on this plea. And he is not giving up any of his appellate remedies other than the waiver of the three rights specifically enumerated. . . ." App. 82.

3. Petitioner thus reasonably believed the plea bargain preserved his right to challenge on appeal the trial court's holding that the SAMP Act was constitutional "as applied to this case." Even assuming some ambiguity in the plea bargain on this score, the doctrine of lenity militates in favor of adopting petitioner's reasonable understanding.

Due process requires that a defendant be advised of and understand the consequences of a guilty plea. *United States v. Salmon*, 944 F.2d 1106, 1130 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1213 (1992); *United States v. Pearson*, 910 F.2d 221, 223 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 977 (1991); *United States v. Briggs*, 939 F.2d 222, 227 (5th Cir. 1991). Petitioner was affirmatively led to believe his

guilty plea preserved a right to appeal the trial judge's rejection of his constitutional attack on the SAMP Act as applied to his case. The failure of the State of California to honor petitioner's understanding violated due process. *Santobello v. New York,* 404 U.S. 257 (1971).

CONCLUSION

Respondent's brief reinforces the conclusion that this Court should grant the Petition for a Writ of Certiorari regarding Question 2, vacate the judgment, remand to the California Court of Appeal, and instruct that court either to permit petitioner to withdraw his guilty plea, or to entertain his constitutional attack on the SAMP Act as applied to his case.

Respectfully submitted,

BRUCE ELLIOTT FEIN
Attorney at Law
562 Innsbruck Avenue
Great Falls, VA 22066
(703) 759-5011

Counsel for Petitioner